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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION,
Cross-Petitioners,

v.

THE STATE OF WYOMING, et al.,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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QUESTIONS PRESENTED

1. Whether, under the Second Treaty of Fort Bridger, pursuant to which the Wind River Indian Reservation was established, the amount of water reserved for the Indians is to be quantified solely by reference to the irrigation needs of the Reservation or rather, in light of the Treaty's express purpose of creating a "permanent home" for the Indians, by reference to all uses necessary to develop a permanent homeland for the Indians on the Reservation.

2. Whether, under the Treaty, the water rights of the Tribes relate only to surface-water sources or rather to both surface-water and groundwater sources.

3. Whether, under the Treaty, the Tribes are restricted from exporting their reserved water off the Reservation for use by themselves or by others or rather, consistently with the rights enjoyed by all other water users in Wyoming, they may export their reserved water off the Reservation.

4. Whether, under 25 U.S.C. § 194, which governs the burden of proof in disputes regarding Indian property, the Wyoming courts erred in assigning the Tribes, after a *prima facie* case had been made, the burden of proof in establishing their reserved water rights for the irrigation needs of currently and previously irrigated Reservation lands without state water certificates and of two proposed irrigation projects.

5. Whether the Wyoming courts erred in computing the amount of water reserved for the irrigation needs of currently and previously irrigated Reservation lands by using a water-use efficiency rate substantially higher than the average efficiency rate currently achieved by all irrigators in the region.

6. What priority date should be accorded to practicably irrigable Reservation lands owned by non-Indians who have claimed a reserved right?

LIST OF PARTIES

The parties to the proceedings below were the cross-petitioners, the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation, and the cross-respondents, the State of Wyoming, the United States of America, Mary O. Ahlborn, Eva M. Barnett, Owen Barnett, Bradford Bath, Donald Bath, Black Butte Livestock Company, Campbells, Inc., City of Riverton, Wyoming, Kenneth Ward Crandall, Phyllis L. Crandall, DHB & Co., Barbara J. Daniels, Billie M. Daniels, Deaver Irrigation District, Carl Dockery, Carol Dockery, Clyde R. Fisher, Gloria A. Fisher, Charles Goldben, Grace Graboski, Griffin Brothers, Incorporated, Olga J. Harvey, Robert W. Harvey, Albert Hornecker, Hornecker Livestock Co., Inc., Bertha Jones, Brenda Joyce Kellogg, Gary V. Kellogg, Irene M. Long, Russell E. Long, Elsie Martin, Richard Martin, William A. Matthews, Arthur D. McCumber, Marvin W. Meyer, Ernestine S. Meyer, Midvale Irrigation District, Carolyn R. Nelson, Vern Nelson, Norwest Bank of Omaha, N.A., Norris Edwin Odee, F. Louise Odee, William Okie, Kenneth Outland, Iona Outland, Owl Creek Irrigation District members, PLB & Co., Sylvia Paulsen, Red Creek Cattle Company, Red Lane Watershed Improvement District, Jerry D. Redding, Sheila C. Redding, Charles Richardson, Riverton Valley Irrigation District, C. Duane Rush, Kathryn C. Rush, Brian F. Sanford, Kathleen Sanford, Norman L. Sanford, Daisy E. Sessions, Newell S. Sessions, Barbara Smith, Robert Stewart, Town of East Thermopolis, Wyoming, Ralph Floyd Urbigkit, V E Bar Livestock Company, Barbara Webber, Landis Webber, Delores J. Weese, Raymond

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
TREATY INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	9
I. The Supreme Court of Wyoming's Ruling that the Amount of Water Reserved Under the Treaty Is Limited to That Necessary Only for the Irrigation Needs of the Reservation Is Erroneous and Inconsistent with This Court's Decision in *United States v. Shoshone Tribe*	11
II. The Supreme Court of Wyoming Erred in Failing To Recognize the Rights of the Tribes Under the Treaty with Respect to Groundwater	18
III. The Tribes Are Not Restricted Under the Treaty from Exporting Their Reserved Water off the Reservation for Use by Themselves or by Others	22
IV. The Wyoming Courts Improperly Assigned the Tribes the Burden of Proof in Establishing Their Reserved Water Rights for the Irrigation Needs of Two Proposed Irrigation Projects and of Historic Lands Without State Water Certificates	26
V. The Wyoming Courts Erred in Computing the Quantity of Water Reserved for the Tribes' Irrigation Needs on the Historic Lands by Using a Water-Use Efficiency Rate Higher than the Average Rate Achieved by Irrigators in the Region	28

VI. The Priority Date for Reservation Lands Owned by Non-Indians Should Be No Earlier than That for Reservation Lands Reacquired by the Tribes from Non-Indians 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES:	Page
Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918)	17
Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983)	11
Cappaert v. United States, 426 U.S. 128 (1976)	19-20
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)	17
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	4,11
Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981)	20
Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954)	25
Nevada ex rel. Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960)	20
New Mexico ex rel. Reynolds v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985)	20
Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974)	24
Shoshone Tribe v. United States, 85 Ct. Cl. 331 (1937), *aff'd*, 304 U.S. 11 (1938)	15
Shoshone Tribe v. United States, 299 U.S. 476 (1937)	3
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982)	22,25
The Kansas Indians, 72 U.S. (5 Wall) 737 (1867)	17
Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968)	20

United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974), *aff'd on other grounds*, 426 U.S. 128 (1976) 19-20

United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971) 8

United States v. Shoshone Tribe, 304 U.S. 111 (1938) 2,3,15-18,22,24

Wilson v. Omaha Tribe, 442 U.S. 653 (1979) 27-28

Winters v. United States, 207 U.S. 564 (1908) 14

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 17

STATUTES AND BILLS:

1977 Wyo. Sess. Laws Ch. 2, § 1, Wyo. Stat. § 1-37-106 (1977) 4

28 U.S.C. § 1257(3) (1982) 1

Act of June 30, 1834, ch. 161, 4 Stat. 733 (codified at 25 U.S.C. § 194 (1982)) 27

First Treaty of Fort Bridger, 18 Stat. 685 (Part 3) (1863) 2

McCarran Amendment, 43 U.S.C. § 666 (1982) 4,23

Non-Intercourse Act, 25 U.S.C. § 177 (1982) 23-24

Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, S. 2153, 100th Cong., 2d Sess. § 8 24

Second Treaty of Fort Bridger, 15 Stat. 673 (1868) ..... *passim*

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Wyo. Stat. §§ 41-3-103, 104 (1977) 25

Wyo. Stat. § 41-3-916 (1977) 19

MISCELLANEOUS:

Comment, *Leasing Indian Water Off the Reservation: A Use Consistent With the Reservation's Purpose*, 76 Calif. L. Rev. 179 (1988) 24

F. Cohen, *Handbook on Federal Indian Law* (1982) 25

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National Water Commission, *Water Policies for the Future* 233 (1973) 19

Trelease, *Conjunctive Use of Groundwater and Surface Water*, 27B Rocky Mtn. Min. L. Inst. 1853 (1982) 19

Western Governors' Association, *Western Water: Tuning the System* (1986) 25

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

The cross-petitioners, the Shoshone and Northern Arapaho Indian Tribes, respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Wyoming entered on February 24, 1988, on the questions presented herein if this Court grants the petition in *Wyoming v. United States*, No. 88-309.

OPINIONS BELOW

The opinions below are reproduced in the appendix to the petition of the State of Wyoming in No. 88-309, as described in the State's petition at page 1.

JURISDICTION

The decision of the Supreme Court of Wyoming was rendered on February 24, 1988, and timely motions for rehearing were denied by that court on April 22, 1988. On July 7, 1988, the State of Wyoming obtained an extension of time to file its petition for a writ of certiorari through August 20, 1988. Cross-petitioners received the State's timely-filed petition on August 22, 1988. This cross-petition is filed pursuant to Rule 19.5, and jurisdiction is proper under 28 U.S.C. § 1257(3).

TREATY INVOLVED

The provisions of the Second Treaty of Fort Bridger, 15 Stat. 673 (1868), are set forth in the appendix to the petition ("Pet. App.") of the State of Wyoming in No. 88-309. Pet. App. at 793a-803a.

STATEMENT OF THE CASE

This cross-petition concerns the reserved water rights of the Shoshone and Northern Arapaho Tribes under the

Second Treaty of Fort Bridger, 15 Stat. 673, pursuant to which the United States set apart the Wind River Indian Reservation as the permanent homeland originally for the Shoshone Tribe and, later, for both the Shoshone and Northern Arapaho Tribes (the "Tribes").

History of the Wind River Indian Reservation

In 1863, five years before the Wind River Indian Reservation was established, the United States and the Shoshone Tribe, which were military allies and had long maintained friendly relations, entered into the First Treaty of Fort Bridger, 18 Stat. 685 (Part 3) (1863). Pet. App. at 9a. That treaty declared "a firm and perpetual peace . . . between the Shoshonee nation and the United States" and recognized as "Shoshonee country" a tract of 44,672,000 acres of land located in what are now the states of Wyoming, Colorado and Utah. First Treaty of Fort Bridger, arts. 1, 4; Pet. App. at 9a.

In 1868, as westward expansion increased following the end of the Civil War, the United States and the Shoshone Tribe—then "consisting of full blood blanket Indians, unable to read, write or speak English," *United States v. Shoshone Tribe*, 304 U.S. 111, 114 (1938)—entered into the Second Treaty of Fort Bridger (the "Treaty"). 15 Stat. 673; Pet. App. at 793a. Under the terms of the Treaty, the Shoshone Tribe agreed to "relinquish all title, claims, or rights" to the vast tract of land previously recognized as "Shoshonee country" under the First Treaty of Fort Bridger. Second Treaty of Fort Bridger, art. 2. In return, the United States agreed to "set apart" a much smaller tract of land—now known as the Wind River Indian Reservation (the "Reservation")—in what was later to become the State of Wyoming "for the absolute and undisturbed use and occupation of the Shoshonee Indians."[1] *Id.* Under

[1] Under the Treaty, the United States set apart a tract of 3,054,182 acres for the Shoshone Tribe, United States v. Shoshone Tribe, 304

the terms of the Treaty, the Tribe agreed to make the Reservation its "permanent home." *Id.* at art. 4.

The Shoshones, whose "loyalty . . . to the people of the United States has been conspicuous and unfaltering," *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937), had been permitted to select the lands comprising the Reservation. Pet. at 4. The tract of land selected by the Shoshones was then "known to contain valuable mineral deposits—gold, oil, coal and gypsum [and to include] more than 400,000 acres of timber, extensive well-grassed bench lands and fertile river valleys conveniently irrigable." *United States v. Shoshone Tribe*, 304 U.S. 111, 114 (1938). Moreover, the tract selected by the Shoshones "was well protected by mountain ranges and a divide, and was the choicest and best-watered portion of Wyoming." *Id.* These lands were reserved by the Treaty for the permanent homeland of the Shoshones before the United States had created the Territory of Wyoming, and more than twenty-one years before Wyoming was admitted to the Union in 1890.

Although originally set apart for only the Shoshone Tribe, the Reservation has since become the permanent homeland of both the Shoshone and Northern Arapaho Tribes. The two Tribes have jointly occupied the Reservation since 1878. Pet. App. at 9a-10a.

Procedural History of the Adjudication

This adjudication began more than a decade ago when the State of Wyoming sued the United States for a declaration of federal and Indian water rights in the Big Horn River Drainage Basin (the "Big Horn Basin"), in which

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U.S. 111, 113 (1938), of which approximately two-thirds currently remain part of the Wind River Indian Reservation. Under the Treaty, the United States also agreed to set apart a reservation, later known as the Fort Hall Reservation, for the Bannock Tribe. Second Treaty of Fort Bridger, art. 2.

the Reservation is located. The State sought this declaration of federal and Indian water rights in its own state courts in connection with an adjudication of all water rights in the Big Horn Basin. This proceeding was filed pursuant to a state statute—enacted two days before the action was filed—establishing a procedure for determining all rights to water in river systems within the state. 1977 Wyo. Sess. Laws Ch. 2, § 1, Wyo. Stat. § 1-37-106 (1977); Pet. App. 726a.

On the same day the proceeding was filed, the state district court ruled that the joinder of the United States in the state proceeding was proper under the McCarran Amendment, 43 U.S.C. § 666 (1982). The United States thereafter removed the proceeding to federal district court, but that court remanded the proceeding to state court, largely in light of this Court's ruling in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Pet. App. at 720a. Thereafter, the United States, supported by an amicus brief from the Tribes, moved to dismiss the state proceeding on the ground that the state court lacked jurisdiction to resolve the federal and Indian water rights. *Id.* at 11a-12a. The state district court denied the Government's motion to dismiss. *Id.* at 12a. The Tribes, having depended on the waters of the Big Horn Basin for more than a century, intervened in the state adjudication to protect their water rights under the Treaty.

Pursuant to the statute authorizing the general adjudication, the State moved to certify the proceeding to a state administrative agency, the Board of Control, to conduct the adjudication. *Id.* at 396a. The United States and the Tribes opposed this motion, arguing that the Board of Control had no special expertise to resolve the federal-law issues of reserved water rights because the water law of Wyoming, which the agency administers, is based on priority of historical, actual beneficial use of water ("prior appropriation"), whereas the federal law of reserved water rights is based on the implicit reservation of water by the

United States to accomplish the purposes of the federal enclave or Indian reservation, even if such water has not as yet been put to beneficial use.

The state district court denied the State's motion and, in May 1979, appointed a Special Master approved by all the parties. The Special Master divided the general adjudication into three phases. The first phase—the only phase at issue here—was a determination of Indian reserved water rights.

On December 15, 1982, after extensive pretrial discovery and a lengthy trial, the Special Master signed his Report and proposed Decree regarding the water rights reserved for the Tribes under the Treaty. Pet. App. at 367a.

The Rulings Below

The Special Master ruled that, when the United States established the Reservation pursuant to the Treaty in 1868, water rights were reserved on behalf of the Indians to satisfy the purpose of the Treaty. *Id.* at 432a. The Special Master further ruled that "the principal purpose for entering into this Treaty was to provide the Indians with a homeland where they could establish a permanent place to live and develop their civilization." *Id.* at 442a. In light of this purpose, the Special Master held that the amount of water reserved by the Treaty was that necessary for the development of the Reservation as a permanent homeland for the Indians. *Id.* This amount included that "necessary to provide for the Indians not only in their agricultural development, but also in the raising of livestock, the assurance that fish and wildlife will also be available for their use, the development of the minerals that may be found on the Reservation, the growth and provision for municipal and industrial civilization, and for protection and preservation of the aesthetic natural conditions found on the Reservation." *Id.*

On May 10, 1983, the state district court ruled on the parties' objections to the Special Master's Report. *Id.* at

202a. The court ruled, as a matter of law, that the purpose of establishing the Reservation was not, as the Special Master held, to provide a permanent homeland for the Tribes, but rather to convert the Indians into "an agrarian people whose livelihood would be earned by farming." *Id.* at 217a. Having concluded that "the sole purpose of the Reservation was agriculture," *id.* at 220a, the court reduced the total amount of reserved water quantified by the Special Master and awarded only the amount necessary to irrigate the Reservation lands found to be practically irrigable.

The district court rejected the Special Master's rulings on several other issues. Although the Special Master had granted the Tribes certain reserved rights to groundwater under the Treaty, *id.* at 607a-611a, the district court flatly rejected all claims for reserved rights to groundwater. *Id.* at 238a-243a. Indeed, the court held that "the State of Wyoming owns all groundwater, even that which flows beneath the reservation." *Id.* at 242a. In addition, with respect to the issue of exportation, the Special Master had held that the Tribes were permitted in certain circumstances to export reserved surface water off the Reservation for use by themselves or by others. *Id.* at 580a-582a. By contrast, the district court ruled that the Tribes' use of their reserved water "is confined to the reservation," *id.* at 269a, and that any leasing of the Tribes' reserved water rights "cannot be for exportation off of the reservation." *Id.*

Moreover, the district court affirmed the denial of reserved water rights for the irrigation needs of the Tribes for two future irrigation projects (Stagner Ridge and Big Horn Flats Extension) and for various tracts of currently or historically irrigated Reservation lands ("historic lands") without state water certificates. *Id.* at 246a-250a, 259a. Finally, in determining the amount of water reserved by reference to the Tribes' irrigation needs for the historic lands, the district court affirmed the use of an efficiency

rate for water use of 40 percent, whereas the average rate achieved by all irrigators in the region is only 35 percent. *Id.* at 250a; 508a-512a.

After the district court entered a final amended judgment and decree on May 24, 1985, *id.* at 168a, the parties appealed to the Supreme Court of Wyoming.

That court affirmed the district court's decision on the issues presented in this cross-petition. Contrary to the Special Master's finding that the Reservation was created to provide a permanent homeland for the Indians, the state supreme court concluded, by a vote of three to two, that "the intent at the time [of the Treaty was] to create a reservation with a sole agricultural purpose." *Id.* at 38a. In light of this conclusion, the state supreme court majority affirmed the district court's reduction of the amount of water reserved for the Tribes to that necessary only for the irrigation needs of the Reservation.[2] *Id.* at 32a-43a.

With respect to groundwater, the state supreme court, while acknowledging that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater," *id.* at 44a, affirmed the district court's denial of a reserved right to groundwater. *Id.* at 44a-45a. With respect to exportation, the state supreme court declined to address the merits of the appeals by the Tribes and the United States of the district court's ruling that the Tribes were not permitted under the Treaty to export their reserved water. *Id.* at 45a. With respect to the burden of proof, the state supreme court affirmed the placement of the burden on the Tribes to establish their reserved water rights for the irrigation of certain Reservation lands, *id.* at 49a, 60a-62a,

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[2] The state supreme court held that there was "a reserved water right for municipal, domestic, and commercial use," Pet. App. at 43a, but that the amount of water reserved for such use, as well as that for livestock use, was subsumed in the amount necessary to irrigate the practicably irrigable acreage on the Reservation. *Id.* at 42a-43a.

the result of which was to deny the Tribes reserved water rights for the irrigation of 11,916 acres of historic lands and of 9,970 acres of land in the proposed Stagner Ridge and Big Horn Flats Extension projects. *Id.* at 58a-59a, 65a-68a. Finally, with respect to the water-use efficiency rate to be used in quantifying the Tribes' reserved water rights in connection with the historic lands, the state supreme court affirmed the district court's use of a rate substantially higher than the average rate for irrigation projects in the region. *Id.* at 68a-69a

Presentation of Federal Questions

The questions presented in this cross-petition, which involve the reserved water rights of the Shoshone and Northern Arapaho Tribes under the Second Treaty of Fort Bridger, are questions of federal law, *see, e.g., United States v. District Court in and for the County of Eagle*, 401 U.S. 520, 526 (1971), and were properly raised below.[3]

[3] In the proceedings below, the Tribes asserted that the amount of water reserved under the Treaty is that necessary for the development of the Reservation as a permanent homeland, including the agricultural and non-agricultural development of the Reservation. *See* Special Master's Report (Pet. App. at 441a); Opening Brief of Appellants Shoshone and Northern Arapaho Tribes (Type Two Issues) at 18-57 (Dec. 16, 1985) ("Tribes' Type Two Brief"). The Tribes also asserted reserved rights to groundwater. *See* Special Master's Report (Pet. App. at 602a); Tribes' Type Two Brief at 58-66. When the district court limited all uses of the Tribes' reserved water to the Reservation, Pet. App. at 222a, the Tribes requested the Supreme Court of Wyoming to overturn this ruling. *See* Tribes' Type Two Brief at 80-82. In addition, the Tribes asserted below that the Wyoming courts had erred in assigning to the Tribes the burden of establishing their reserved rights under the Treaty. Opening Brief of Appellants Shoshone and Northern Arapaho Tribes (Type One Issues) at 26-28 (Dec. 16, 1985) ("Tribes' Type One Brief"); *see also* Brief for the Appellant United States at 33-43 (Dec. 1985). Finally, with respect to the quantification of the reserved water right for the historic lands, the Tribes sought the use of a water-use efficiency rate equal to the rate actually achieved by irrigators in the region, Special Master's Report (Pet. App. at 509a-510a), and sought to have the use of the higher rate overturned. Tribes' Type One Brief at 54-55.

REASONS FOR GRANTING THE WRIT

This cross-petition presents substantial questions of federal law regarding the reserved water rights of the Shoshone and Northern Arapaho Tribes. The Tribes seek review by this Court of these questions in the event that the State of Wyoming's petition in *Wyoming v. United States*, No. 88-309, is granted.

The Wyoming state courts erroneously limited the reserved water rights of the Tribes under the Second Treaty of Fort Bridger, pursuant to which the United States established the Wind River Indian Reservation. Contrary to the provisions of the Treaty, the state courts concluded that the Reservation was created for a sole agricultural purpose and thereby improperly restricted the amount of water reserved under the Treaty to that necessary only for irrigation needs on the Reservation. Thus, even though the Treaty expressly provides that the Reservation was established as a "permanent home" for the Indians, the state courts allotted no water for any of the other uses necessary to develop a permanent homeland for the Indians on the Reservation.

The state courts also erred in failing to recognize any treaty rights of the Tribes with respect to groundwater, even the right to substitute the use of groundwater to satisfy the Tribes' reserved rights in circumstances where such use would not increase the Tribes' total water consumption. The state supreme court apparently left undisturbed the district court's erroneous ruling that, under the Treaty, the Tribes may not export their water off their land, a right enjoyed by every other water user in Wyoming. Contrary to the federal statute governing the burden of proof in disputes involving Indian property, the state courts erred in assigning the Tribes, after a *prima facie* case had been made, the burden of proof in establishing their reserved water rights for the irrigation needs of certain Reservation lands, the result of which was to deny

the Tribes reserved rights for the irrigation of more than 21,000 acres of the Reservation. Finally, in determining the amount of reserved water for the irrigation needs of the Tribes on the historic lands, the state courts erred in applying a water-use efficiency rate substantially higher than the average rate for irrigation projects in the region, the result of which was to reduce the total award of water for these lands by 12.5 percent.

The resolution by this Court of the questions presented here—involving Treaty purposes, groundwater, exportation, burden of proof, and efficiency—would be of great importance to the Shoshone and Northern Arapaho Tribes. But even more important to the Tribes would be a prompt end to this adjudication initiated by the State more than a decade ago. The Tribes desperately need to develop the economy on the Reservation, where the unemployment rate currently exceeds 70 percent, alcoholism and substance abuse are rampant, and the suicide rate is tragically high. During the past ten years, the efforts of the Tribes to develop the Reservation economy have been largely thwarted by this adjudication, for, until it is finally resolved, the Tribes cannot make meaningful decisions regarding how best to use their most valuable resource, water, for the benefit of their members. It would be a devastating blow to the Tribes if, as the State urges, this Court were to revise the well-established standards for quantifying Indian water rights for agricultural purposes based on practicably irrigable acreage and remit the Tribes to another decade of uncertainty in litigation. Accordingly, for these reasons and those stated in their Opposition Brief, the Tribes urge this Court not to review any of the rulings of the state courts.

But, in the event that the Court decides to review the questions presented by the State, the Court should also review the questions presented in this cross-petition, all of which were erroneously resolved against the Tribes and the United States by Wyoming's own state courts. The

Tribes and the United States objected to the jurisdiction of the Wyoming courts in this matter. But these objections were overruled in light of *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809-13 (1976), in which this Court held that the adjudication of Indian water rights, unlike all other rights possessed by Indian Tribes, should occur in state, not federal, court. In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), this Court, recognizing that it had become the only federal forum available to Indian Tribes to protect these important treaty rights, accepted a special responsibility to review state-court rulings alleged to infringe on Indian reserved water rights:

> [A]ny state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

463 U.S. at 571. The Shoshone and Northern Arapaho Tribes look to this pledge in seeking review of the questions raised in this cross-petition in the event that the Court grants the State's petition.

I. The Supreme Court of Wyoming's Ruling that the Amount of Water Reserved Under the Treaty Is Limited to That Necessary Only for the Irrigation Needs of the Reservation Is Erroneous and Inconsistent with This Court's Decision in *United States v. Shoshone Tribe*.

The Supreme Court of Wyoming erroneously restricted the amount of water reserved under the Treaty to that necessary only to irrigate the practicably irrigable lands on the Reservation. The Supreme Court of Wyoming correctly held that "Congress intended to reserve water for the . . . Reservation when it was created in 1868, and . . .

the amount of water impliedly reserved is determined by the purposes for which the reservation was created." Pet. App. 33a. But the court erred in ruling, by a vote of 3 to 2, that the Reservation was created "with a sole agricultural purpose," *id.* at 38a, and thus in determining the amount of reserved water by reference only to the irrigation needs of the Reservation. *Id.* at 32a-43a.

The proper interpretation of the Treaty, as the Special Master ruled, is that the Reservation was created not solely for an agricultural purpose, but rather "to provide a permanent homeland for the Indians so that they may, in whatever way most suitable to their development, establish a permanent civilization on the Wind River Indian Reservation." Pet. App. at 441a-442a. Thus, as the Special Master held, the amount of water reserved under the Treaty is that necessary for the development of the Reservation as a permanent homeland. *Id.* at 442a. This amount includes that necessary not only for the agricultural development of the Reservation, such as for irrigated farming, but also for its non-agricultural development, such as for raising livestock, extracting minerals, ensuring adequate supplies of fish and wildlife, protecting the natural aesthetic condition of the Reservation, and for municipal, domestic, commercial, and industrial uses. *Id.*

The provisions of the Treaty reveal that the Reservation was created to provide a permanent homeland for the Indians. Under the Treaty, the United States agreed that the Reservation "shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians." Second Treaty of Fort Bridger, art. 2; Pet. App. at 795a. In return, the Indians agreed to make the Reservation their "permanent home." Art. 4; Pet. App. at 796a. The Indians further agreed to "relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within [the Reservation]." Art. 2; Pet. App. at 796a. The Treaty sought to "insure the civilization of the tribes

entering into this treaty" and obligated the United States to furnish schools and teachers. Art. 7; Pet. App. at 798a. The United States further agreed to provide the Indians with a physician, carpenter, miller, engineer, and blacksmith. Art. 10; Pet. App. at 800a. As the Special Master held, "the reasonable interpretation [of these provisions] can only lead one to conclude that the purpose of the Treaty was to provide a permanent homeland for the Indians." Pet. App. at 442a.

The contrary ruling of the Supreme Court of Wyoming rests on a cramped and erroneous reading of the Treaty that Justice Thomas, joined in dissent by District Judge Hanscum, rejected because "it assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization." *Id.* at 83a. In finding a sole agricultural purpose for the Reservation, the court relied on the fact that the Treaty contains several provisions promoting agricultural development on the Reservation.[4] *Id.* at 39a. That the

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[4] In concluding that the Reservation had a sole agricultural purpose, the district court had seized upon the phrase "said agricultural reservations" in Article 7 of the Treaty. Pet. App. at 217a. Article 7 provides:

> In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations. . . .

Pet. App. at 798a. The district court concluded that this phrase "confirms the Reservation's singular, and hence primary, purpose as an agricultural reservation." Pet. App. at 217a.

In their briefs to the Supreme Court of Wyoming, the Tribes and the United States argued that, when read in context, the phrase "said agricultural reservations" referred not to the two Indian Reservations created or to be created by the Treaty (Wind River for the Shoshones and Fort Hall for the Bannocks), *see supra* note 1, but rather to the 320- and 80-acre tracts of land made available in Article 6 of the Treaty to individual Indians expressly for agricultural development. The State

Treaty contains these provisions shows only that agricultural development was an *important* objective in establishing the Reservation, not that agricultural development was the *only* objective. As even the state supreme court acknowledged, the Treaty "clearly contemplates that other activities would be permitted (hunting is mentioned in Article 4, lumbering and milling in Article 3, roaming in Article 9)." *Id.* at 40a. Indeed, the court held that there was "a reserved water right for municipal, domestic, and commercial use," *id.* at 43a, but then declined to award an additional amount of reserved water for these uses.[5] *Id.* at 42a-43a. In short, the ruling that the Reservation was created for a sole agricultural purpose is simply incorrect.[6]

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of Wyoming argued that the phrase referred to the two Indian Reservations and thus revealed that the Treaty had a sole agricultural purpose.

The Supreme Court of Wyoming concluded that the phrase was susceptible of both meanings. Pet. App. at 39a. This conclusion means that—certainly from the vantage point of the Shoshones, who were unable to read, write, or speak English when the Treaty was negotiated—the phrase "said agricultural reservations" was at the very least ambiguous. It is well settled that "ambiguities occurring [in Indian treaties] will be resolved from the standpoint of the Indians." Winters v. United States, 207 U.S. 564, 576 (1908); *see also infra* authorities cited in note 9.

[5] The state supreme court held that the amount of water reserved for these uses was subsumed in the amount necessary to irrigate the practicably irrigable acreage on the Reservation. Pet. App. at 42a-43a. The Special Master had correctly awarded the Tribes an *additional* amount of reserved water for their municipal, domestic, commercial, and livestock needs. Pet. App. at 607a-608a. The Supreme Court of Wyoming's ruling that the Tribes are not entitled to an additional amount for these needs means that the Tribes will not even be able to irrigate all the practicably irrigable acres on the Reservation unless the Tribes forego using any of their reserved water for these other needs.

[6] The district court overturned the Special Master's findings of fact in support of the Tribes' claim for reserved water for various non-

The ruling below is also inconsistent with this Court's own interpretation of the Treaty in *United States v. Shoshone Tribe*, 304 U.S. 111 (1938). *Shoshone Tribe* involved a claim for compensation by the Shoshones against the United States based on the federal government's taking of a one-half interest in the Reservation when, in 1878, it permanently relocated the Northern Arapahos, ancestral foes of the Shoshones, on the Reservation. In defending against the claim, the United States argued that the Treaty provided the Shoshones only with the use and benefit of the surface of the land on the Reservation, nothing more. As a result, the Government asserted that the Tribe's claim was limited to the value of the surface estate and did not include the value of minerals or timber. *Id.* at 115. Essentially, the United States argued, as the Supreme Court of Wyoming ruled below, that the purpose of the Reservation was solely to turn the Indians into farmers.[7]

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agricultural uses. In so doing, the district court noted that these findings of the Special Master were "inapplicable . . . as a result of the Court taking a different position . . . on certain conclusions of law." Pet. App. at 209a. These contrary legal positions included the district court's rulings that: "(1) . . . the Tribes' reserved water rights, if they exist, are limited to that amount of water necessary to fulfill the primary purpose of the reservation which was agriculture. . . . [and] (2) To accomplish the purpose of the reservation, Congress did not reserve water for mineral development, municipal needs, industrial development, fisheries, wildlife nor protection of aesthetic natural conditions." *Id.* at 209a-210a. Thus, to the extent that the district court erred in its interpretation of the Treaty, it also erred in overturning the Special Master's factual findings, and both such rulings should be vacated. The same is true of the District Court's rulings regarding groundwater. *Id.* at 209a-210a, 238a-243a, 261a, 263a-264a, 268a-269a.

[7] As described by the Court of Claims, Shoshone Tribe v. United States, 85 Ct. Cl. 331, 360 (1937), the Government's position was that the only rights for which the Shoshones were entitled to compensation were "the rights to live upon the reservation, to use such materials thereon as might be necessary for building and farming purposes and for the purpose of carrying on farming operations thereon. . . ."

This Court flatly rejected the Government's argument, ruling instead that the Treaty granted the Tribe beneficial ownership of the timber and mineral resources within the Reservation. *United States v. Shoshone Tribe*, 304 U.S. 111, 116-118 (1938). In reaching this conclusion, the Court relied on the provisions of the Treaty setting apart the Reservation for "the absolute and undisturbed use and occupation" of the Shoshones and making the Reservation their "permanent home." *Id.* at 113, 116. These provisions were to be construed in accordance with the well-established rules of Indian treaty interpretation:

> [F]riendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.

Id. at 116. Moreover, the Court noted that when the Shoshones entered into the Treaty, the Reservation was "known to contain valuable mineral deposits—gold, oil, coal and gypsum" and "included more than 400,000 acres of timber, extensive well-grassed bench lands and fertile river valleys conveniently irrigable," all located in "the choicest and best-watered portion of Wyoming." *Id.* at 114. In light of these considerations, the Court rejected the Government's arguments and held that:

> *The principal purpose of the treaty was that the Shoshones should have, and permanently dwell in, the* [*Wind River Indian Reservation*]. To that end the United States granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity.

Id. at 116 (emphasis added). In essence, this Court ruled

that the purpose of the Reservation was to establish a permanent homeland for the Indians.[8]

The ruling below is inconsistent not only with this Court's prior interpretation of the Treaty, but also with this Court's ruling in *Shoshone Tribe* that the terms of the Treaty are to be "construed in the sense in which naturally the Indians would understand them."[9] *Id.* at 116. There can be little doubt how the Shoshones "naturally . . . would [have] under[stood]" the Treaty. In 1868, when the Shoshones—then unable to read, write, or speak English—entered into the Treaty, the Tribe and the United States had long enjoyed friendly relations and were even military allies. In return for ceding their rights previously recognized by treaty to a tract of land larger than the State of Missouri, the Shoshones agreed to make their "permanent home" on the Reservation, which the United States agreed to "set apart for [their] absolute and undisturbed use and occupation." The Reservation was a much smaller tract of land than that ceded, but one that the Tribe had selected and that was known to contain valuable mineral resources, extensive timberlands, and fertile river valleys

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[8] This Court reached a similar conclusion with respect to the Miami Tribe in 1867, one year before the United States and the Shoshones signed the Second Treaty of Fort Bridger. The Kansas Indians, 72 U.S. (5 Wall.) 737, 760-761 (1867) ("The object of the Treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians.").

[9] This Court has consistently followed the rules of Indian treaty interpretation applied in *Shoshone Tribe*. *E.g.*, Choctaw Nation v. Oklahoma 397 U.S. 620, 631 (1970) ("this Court has often held that treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor") (citing Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) ("The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.").

conveniently irrigable, and was located in the best-watered area in the region. In these circumstances, the Shoshones "naturally . . . would [have] under[stood]" that the Tribe would be entitled to use all water necessary to develop a permanent homeland on the Reservation.

In sum, the ruling below that the Reservation was created for a sole agricultural purpose is inconsistent with the provisions of the Treaty itself, this Court's interpretation of the Treaty in *Shoshone Tribe*, and the well-settled rules governing Indian treaty interpretation applied by this Court in *Shoshone Tribe*. The Supreme Court of Wyoming has abridged the water rights of the Tribes under the Treaty by erroneously restricting the amount of water reserved for the Tribes to that necessary only for the irrigation needs of the Reservation.

II. The Supreme Court of Wyoming Erred in Failing To Recognize the Rights of the Tribes Under the Treaty with Respect to Groundwater.

The Supreme Court of Wyoming failed to recognize the treaty rights of the Tribes with respect to groundwater. The Special Master held that the Tribes had a reserved right to groundwater from the Reservation's shallow aquifers for domestic, livestock, and commercial uses, Pet. App. at 607a-608a, and that the deeper aquifers on the Reservation were "the proper sources of water for said future industrial activities." *Id.* at 608a. But the district court denied altogether the Tribes' claim to a reserved right to groundwater, finding that "the State of Wyoming owns all groundwater, even that which flows beneath the reservation." *Id.* at 242a. The Supreme Court of Wyoming affirmed this ruling, holding that "[t]he district court did not err in deciding there was no reserved groundwater right." *Id.* at 45a.

The distinction drawn by the Supreme Court of Wyoming between surface water and groundwater is illusory. Most groundwater is directly related to some surface wa-

tercourse; either the watercourse feeds the aquifer or vice versa.[10] A stream, for example, is literally the surface flow of one integrated hydrologic resource that includes the underlying aquifer. As this Court has put it, "groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." *Cappaert v. United States*, 426 U.S. 128, 142 (1976). *See generally* National Water Commission, *Water Policies for the Future* 233 (1973). The fiction of maintaining separate surface-water and groundwater systems has increasingly been criticized because it results in the inefficient use of water, and because resource-management practices should comport with scientific realities. *See, e.g.*, Trelease, *Conjunctive Use of Groundwater and Surface Water*, 27B Rocky Mtn. Min. L. Inst. 1853 (1982). The State of Wyoming has also recognized these hydrologic facts and requires conjunctive management of surface-water and groundwater supplies when the two are connected. Wyo. Stat. § 41-3-916 (1977).

The federal courts have consistently recognized the hydrologic relationship between surface flows and groundwater in decisions involving federal and Indian reserved water rights. In *Cappaert v. United States*, 426 U.S. 128, 138-143 (1976), this Court upheld an injunction prohibiting groundwater pumping from land near Devil's Hole, a national monument set apart to preserve a unique underground pool, to the extent that the groundwater pumping interfered with the federal reserved water right to maintain the level of the surface water in the underground pool. Moreover, the lower federal courts have repeatedly held that federal and Indian reserved rights extend not only to surface water, but also to groundwater.[11]

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[10] The Special Master recognized this interrelationship, noting that certain "shallow aquifers [on the Reservation] . . . depend directly upon the Wind River for their life." Pet. App. at 605a.

[11] United States v. Cappaert, 508 F.2d 313, 317 (9th Cir. 1974) ("the United States may reserve not only surface water, but also underground

In accordance with these federal decisions, the Tribes, supported by the United States, sought three rulings with respect to groundwater. The first of these requested rulings—that the State may not authorize groundwater pumping that would interfere with or impair the decreed treaty rights of the Tribes to reserved water from surface flows—follows directly from this Court's ruling in *Cappaert*. The second requested ruling—that the Tribes may satisfy their reserved rights out of groundwater rather than surface flows, subject to the limitation that such substitution would not increase the Tribes' consumptive use of water—would permit the Tribes the flexibility to draw some of their reserved water from wells rather than to divert all of their water from surface flows. Neither of these requested rulings would result in an additional award of water, and the State itself acknowledged that the Tribes were entitled to

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water"), *aff'd on other grounds*, 426 U.S. 128 (1976); Nevada ex rel. Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958) (upholding the federal government's pumping of groundwater without a state-awarded permit), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960); Tweedy v. Texas Co., 286 F. Supp. 383, 385 (D. Mont. 1968) ("The *Winters* case dealt only with surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid—water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference."); New Mexico ex rel. Reynolds v. Aamod, 618 F. Supp. 993, 1010 (D.N.M. 1985) ("The Pueblo water rights appurtenant to their lands are the surface waters of the stream systems and the groundwater physically interrelated to the surface water as an integral part of the hydrologic cycle. . . . The Pueblos have the prior right to the use of this water."). *See also* Colville Confederated Tribes v. Walton, 647 F.2d 42, 45-47 (9th Cir.) (upholding the reserved right of the Indians to surface flows and groundwater), *cert. denied*, 454 U.S. 1092 (1981).

All of these cases were cited by the Tribes or the United States in their briefs to the Supreme Court of Wyoming. Brief of Appellant United States at 89-94 (Dec. 1985); Tribes' Type Two Brief at 60-66; Reply Brief of Appellants Shoshone and Northern Arapaho Tribes (Type Two Issues) at 49-51 (May 23, 1986).

these rulings.[12] Nonetheless, the Wyoming courts erroneously failed to incorporate either of these requested rulings in their decisions or the decree.

The Wyoming courts further erred in rejecting the third requested ruling regarding groundwater, pursuant to which the Tribes sought an additional amount of reserved water under the Treaty from groundwater sources for certain industrial, domestic, municipal, commercial, livestock and mineral development needs. The Supreme Court of Wyoming flatly rejected this claim for reserved groundwater for the sole reason that "not a single case applying the reserved water doctrine to groundwater is cited to us." Pet. App. at 44a. Such cases had in fact been cited below; *see supra* note 11. But, even if there had been no such precedent, the Supreme Court of Wyoming erred in denying the claim, for it readily conceded that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." *Id.* at 44a. In short, the Supreme Court of

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[12] In its brief to the Supreme Court of Wyoming, the State noted that:

> At the conclusion of the groundwater portion of their brief, the Tribes ask that this Court require the District Court to include in its decree three provisions. Tribes' Appellant's (Type 2) Brief, p. 66. The State has no objection and has never taken a position contrary to either of the first two conditions:
>
> (i) that the State cannot authorize groundwater pumping that interferes with or impairs the Tribes' decreed rights to surface flows; (ii) that permits the Tribes to satisfy their reserved rights out of groundwater instead of surface water provided that such substitution would not adversely affect other water users. . . .

Brief of Appellee State of Wyoming In Response to the Appellants' Briefs of the United States and Tribes (Type 2 Claims) at 115. (Feb. 24, 1986) ("Wyoming's Type Two Brief").

Wyoming erred in concluding that there is no reserved right to groundwater under the Treaty.[13]

III. The Tribes Are Not Restricted Under the Treaty from Exporting Their Reserved Water off the Reservation For Use by Themselves or by Others.

The decision of the Supreme Court of Wyoming apparently leaves undisturbed the district court's erroneous ruling that the Tribes are restricted under the Treaty from exporting their reserved water off the Reservation. The Special Master held that the Tribes are permitted in certain circumstances to export their reserved surface water. Pet. App. at 582a. The district court, however, while recognizing that it could not "dictate to the Tribes how they must use water that comes under a reserved water right," nonetheless ruled that "the Court can restrict any use of said water to within the boundaries of the reservation," *id.* at 264a, and decreed that "the use [as well as the sale of reserved water] is confined to the reservation." *Id.* at 269a. The Tribes and the United States appealed the district court's ruling, but the Supreme Court of Wyoming declined to address the merits of these appeals.[14]

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[13] The reserved rights of the Tribes under the Treaty to groundwater extend not only to the shallow aquifers that are hydrologically related to surface flows, but also to the deep aquifers that are not so related. The reserved rights of the Tribes to this deep groundwater are akin to their mineral rights under the Treaty. *See* United States v. Shoshone Tribe, 304 U.S. 111 (1938).

There is no merit to the ruling of the district court that the Tribes have no reserved rights to groundwater under the Treaty because "the State of Wyoming owns all groundwater, even that which flows beneath the reservation." Pet. App. at 242a. This Court has rightly termed state ownership of water a "legal fiction." Sporhase v. Nebraska ex. rel. Douglas, 458 U.S. 941, 951 (1982).

[14] The Supreme Court of Wyoming's entire discussion of the groundwater issue is as follows:

> The district court held that '[t]he Tribes can sell or lease any

The district court erred in interpreting the Treaty to restrict the Tribes from exporting their reserved water off the Reservation. There is no case support whatsoever for this ruling, and it conflicts with the general rule that Indian tribes are entitled to lease, encumber and alienate their property, subject to federal supervision.[15] Just as this

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> part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the Reservation.' The Tribes did not seek permission to export reserved water, and the United States concedes that no federal law permits the sale of reserved water to non-Indians off the reservation. Because of our holding on the groundwater issue, we need not address the separate constitutional attack on the prohibition of exportation of groundwater.

Pet. App. at 45a. The court's observation that the Tribes did not seek permission to export reserved water is incorrect; both the Tribes and the United States repeatedly asserted that the Tribes are not restricted under the Treaty from exporting reserved water off the Reservation for use themselves or by others. *E.g.*, Decision of the District Court, May 10, 1983 (Pet. App. at 222a); Tribes' Type Two Brief at 80-82; Brief for the Appellant United States at 103-105 (Dec. 1985).

Moreover, the court's observation regarding the "concession" by the United States refers not to the treaty question properly presented in this proceeding—whether the Tribes are restricted under the Treaty from exporting their reserved water off the Reservation for use by themselves or by others—but rather to a statutory question not presented here: whether, under the federal statutes regulating the sale and leasing of Indian trust assets, Congress has presently authorized the Tribes to export reserved water off the Reservation for sale or leasing. This statutory question was not litigated in the Wyoming courts, and indeed the Wyoming courts lacked jurisdiction under the McCarran Amendment, 43 U.S.C. § 666, to resolve that federal statutory question, because, under the McCarran Amendment, the United States did not waive its sovereign immunity with respect to that question.

In view of the state supreme court's apparent belief that no exportation issue was in the case, it may be open to the Tribes to argue to the district court on remand that its holding on the point should be vacated.

[15] Transfers of Indian property interests have always been subject to federal supervision. In 1790, the first Congress adopted the Non-In-

Court in *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938), construed the Treaty as implicitly reserving for the Tribes the mineral resources on the Reservation—the rights to which the Tribes have since leased to third parties—so, too, should the Treaty be interpreted to afford the Tribes the right to export their water resources reserved under the Treaty for use off the Reservation by others. *See generally* Comment, *Leasing Indian Water Off the Reservation: A Use Consistent with the Reservation's Purpose*, 76 Calif. L. Rev. 179, 199-200 (1988) ("Off-reservation leases of Indian water rights further . . . congressional policies and thus are a use consistent with the purposes of the reservation.").

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tercourse Act, 25 U.S.C. § 177 (1982), requiring congressional approval of any transfers of Indian land. Since then, Congress has continued to occupy the field of Indian land transactions by maintaining a comprehensive statutory scheme on the subject. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). In addition, Congress has adopted omnibus legislation authorizing the leasing of various tribal resources, such as the leasing of mineral rights. *See generally* F. Cohen, Handbook of Federal Indian Law, ch. 9 (1982). Indeed, Congress has specifically approved the transfer of Indian water rights in connection with the Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, § 306(c) & (d), 96 Stat. 1280 (affording Papago Tribe the right to use water "within or outside the Papago Reservation" and to "sell, exchange or temporarily dispose of water, but the tribe may not permanently alienate any water right."). Congress is also now actively considering several bills concerning Indian water transfers. *See, e.g.*, Ute Indian Water Settlement Act of 1988, H.R. 5029, 100th Cong. 2d Sess. § 7 (Water provided under the settlement may be devoted to all types of uses, including "municipal, industrial, recreational, in-stream uses, sale, lease, or any other use whatsoever. . . ."); Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, S. 2153, 100th Cong. 2d Sess. § 8 (providing that the community "shall lease" up to 13,300 acre feet to the City of Phoenix, but limiting other leases or transfers of water). In short, interests in Indian land and other natural resources are inherently transferable, subject to federal supervision.

Transfers of water play a central role in ensuring the efficient use of this scarce resource in the American West. A smoothly operating market system assures that water can be moved from outmoded uses to new, more cost-effective ones. *See, e.g.*, Western Governors' Association, *Western Water: Tuning the System* (1986); Getches, *Water Use Efficiency: The Value of Water in the West*, 8 Public Land L. Rev. 1, 17-23 (1987). The western water market is expanding rapidly, and this Court has facilitated these developments by recognizing that "water is an article of commerce. . . ." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982).

Wyoming has recognized the importance of water transfers, and such transfers are expressly permitted under Wyoming law. Wyo. Stat. §§ 41-3-103, 104. Indeed, the Tribes are not seeking any greater right to transfer water than that enjoyed by all other water users in the State.[16] The rigid limitations imposed by the district court would disadvantage the Indians who, like their fellow citizens in Wyoming, should as a matter of fairness be in a position to maximize the development potential from their re-

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[16] The State conceded below that it "would not be discomfited if this Court were to hold that the Tribes may obtain changes in use or places of use of reserved water rights [in accordance with the provisions of Wyoming law]." Wyoming's Type Two Brief at 159.

The Tribes acknowledge that, as a matter of fairness, transfers of water should be consistent with restrictions similar to those imposed by state law. *See* Tribes' Type Two Brief at 81. This is a recognition of the fact that other water users may depend on the return flow from tribal water uses; thus transfers can only include an amount equal to the beneficial consumptive use, not the total amount diverted. *See, e.g.*, Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954). In the context of Indian reserved rights not previously used, this means that the Tribes' entitlement to export water should be limited only if such exportation would cause other water users to be "worse off than they would have been if the rights had been exercised for their original use at the original place." *See* F. Cohen, Handbook of Indian Law 592 (1982 ed.).

sources. The district court's ruling would also negatively affect the economy in the region, for the ruling precludes the transfer of water to its most efficient use.

In the absence of an explicit limitation on the use of water in the Treaty itself, the Treaty should be construed to permit the Tribes to export their reserved water off the Reservation for use by themselves or by others, subject to federal supervision. Permitting such transfers not only would ensure that a scarce resource is put to its best use, but also would provide the Tribes with a source of critically needed funds to hasten the economic development of the Reservation.

IV. The Wyoming Courts Improperly Assigned the Tribes the Burden of Proof in Establishing Their Reserved Water Rights for the Irrigation Needs of Two Proposed Irrigation Projects and of Historic Lands Without State Water Certificates.

The Wyoming courts placed the burden of proof on the Tribes in establishing a reserved water right for historic lands without state water certificates, Pet. App. 60a-61a,[17] and for lands not previously irrigated but asserted to be practically irrigable ("future lands"). *Id.* at 49a. As a result, the Tribes were denied reserved water rights for 11,916 acres of historic lands,[18] and also for 9,970 acres of future lands (the proposed Stagner Ridge and Big Horn Flats Extension projects) that were conceded to be arable and practically irrigable from an engineering standpoint.[19]

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[17] In contrast, lands subject to uncancelled state water certificates were correctly presumed to be practically irrigable, Pet. App. 60a-61a. with the burden placed on the State to show the contrary.

[18] *See* Pet. App. at 65a (6,298 acres), 67a (1,675 acres), 68a (3,943 acres). The last category includes some Indian fee lands which have not been irrigated but which the Tribes demonstrated are substantially similar to lands that have been irrigated.

[19] *See* Pet. App. at 58a-59a, 585a.

The assignment of the burden of proof to the Tribes with respect to these lands was reversible error. The Act of June 30, 1834, Ch. 161 § 22, 4 Stat. 733, as codified at 25 U.S.C. § 194 (1982), provides:

> In all cases about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

In *Wilson v. Omaha Tribe*, 442 U.S. 653 (1979), this Court noted that "[s]ection 194 is triggered once the tribe makes out a prima facie case of prior possession or title to the particular *area* under dispute." *Id.* at 668 (emphasis in original).[20]

This case presents the novel question of how the Section 194 presumption applies to property consisting of water rights. A *prima facie* case would seem to require the following: (1) a showing that the land (the "area") is owned by the Tribes, and (2) a showing that the land for which water is claimed either (a) currently is or historically has been irrigated or (b) is arable and practically irrigable from an engineering standpoint.

As already noted, the Tribes concededly made those showings; yet more was demanded of them because of the

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[20] In *Wilson*, the Court held that Section 194 does not operate against a sovereign state involved in litigating title to property "to which it claims ownership, particularly where its opposition is an organized Indian tribe litigating with the help of the United States of America." *Id.* at 668. The present case does not involve those circumstances. First, the non-Indian claimants to property rights in the water of the Big Horn system are individual water users; the State of Wyoming claimed no interest in the water for itself. Second, with respect to the Tribes' claim for water for the two proposed irrigation projects on future lands, the Tribes were not litigating with the help of the United States, which did not support the Tribes in that claim.

state courts' incorrect assignment of the burden of proof. The state courts held that the Tribes had not sustained the burden of proving that the lands were irrigable from an economic point of view. They should have held, instead, that the State had the burden both of introducing evidence that the lands are not irrigable because of economic factors and of sustaining a burden of persuasion to that effect by a preponderance of the evidence. *Wilson*, *supra*, 442 U.S. at 669.

V. The Wyoming Courts Erred in Computing the Quantity of Water Reserved for the Tribes' Irrigation Needs on the Historic Lands by Using a Water-Use Efficiency Rate Higher than the Average Rate Achieved by Irrigators in the Region.

The Supreme Court of Wyoming erred with respect to the water-use efficiency rate to be used in quantifying the water reserved under the Treaty for the irrigation needs of the Tribes on the historic lands.[21] The Supreme Court of Wyoming erroneously used a water-use efficiency rate of 40 percent, whereas the average rate achieved by all irrigators in the region is only 35 percent. Pet. App. at 68a-69a. The result of this ruling was to reduce the total award of water to the Tribes for these lands by 12.5 percent.

The Wyoming courts sought to justify this use of a higher efficiency rate as a means of encouraging water conservation on the historic lands. Laudable as that objective may be, the practical effect of the ruling is to discriminate against the Indians by quantifying only their water rights under a higher efficiency rate, a rate that the Indians can meet only through expensive modifications

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[21] The water-use efficiency rate used in quantifying a reserved water right has a direct, inverse relationship to the total amount of an award, because the more efficient the use of water for irrigation or any other use, the less total water needs to be diverted.

of existing irrigation facilities (including irrigation canals shared by non-Indian irrigators on the Reservation). In justifying this disparity, the state supreme court noted that the Special Master "had no power to order an efficiency increase for non-Indian users." *Id.* at 69a. Thus, in the context of a general stream adjudication of the rights of all water users in the Big Horn Basin, the Wyoming state courts have quantified only the Indian water rights by reference to a higher efficiency rate than the average now achieved by all irrigators in the region.

The Wyoming courts erred in reducing the total award of water by quantifying the reserved right of the Tribes for the irrigation needs of the historic lands by using the 40 percent efficiency rate. The proper efficiency rate in this context should be no higher that that achieved by similarly situated water users. The disparate burden imposed by the Wyoming courts on the federal treaty rights of the Tribes is both unfair and incorrect.

VI. The Priority Date for Reservation Lands Owned by Non-Indians Should Be No Earlier than That for Reservation Lands Reacquired by the Tribes from Non-Indians.

The Tribes present a final issue simply as a matter of fairness. The State has raised the question of the appropriate priority date to be accorded a reserved water right for practicably irrigable Reservation lands reacquired by the Tribes from non-Indians. Pet. at 28-29. The State has apparently raised this question only as it applies to lands that have been reacquired from non-Indians by the Tribes, without raising the question of the appropriate priority date for lands that remain in non-Indian ownership and for which reserved rights have been claimed. In the proceedings below, the State opposed the reserved-water-right claims of such non-Indians, *see* Pet. at 9, but here the State seems to have addressed its challenge only against the Tribes. Surely, in this context, the non-Indians—who

are direct competitors with the Indians for water on the Reservation—should have no earlier priority date or more favorable treatment in determining that date than the Indians on whose behalf the water rights were reserved pursuant to the Treaty. Accordingly, in the event that the Court decides to hear this issue, it should address the question as it pertains to both Indians and non-Indians.

CONCLUSION

In the event that the petition of the State of Wyoming in *Wyoming v. United States*, No. 88-309, is granted, this cross-petition for a writ of certiorari should also be granted.

Respectfully submitted,

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September 21, 1988

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No. 88-492

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

SHOSHONE TRIBE and NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION,
Cross-Petitioners,
v.
THE STATE OF WYOMING, *et al.*,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari for the Supreme Court of Wyoming

---

MEMORANDUM OF CITY OF RIVERTON, *ET AL.*, CROSS-RESPONDENTS, OPPOSING CROSS-PETITION FOR CERTIORARI

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MEMORANDUM OF CITY OF RIVERTON, *ET AL.*, CROSS-RESPONDENTS, OPPOSING CROSS-PETITION FOR CERTIORARI

This matter arises from the Federal reserved water right claims of the United States of America and the Shoshone and Arapaho Tribes for the Wind River Indian Reservation in Wyoming. The Wyoming Supreme Court issued its decision in part granting and denying the claims of the United States and Tribes on February 24, 1988. The Tribes, by cross-petition for certiorari, now seek this Court's review of the decision, alleging that the Wyoming Supreme Court improperly: (1) limited the purpose of the Reservation, (2) denied the Tribes a Federal reserved water right to use groundwater, (3) denied the Tribes' right to export reserved water for uses outside the Reservation, (4) misassigned the burden of

proof, (5) imposed an overly restrictive water use efficiency upon the Tribes' reserved water right uses, and (6) awarded an incorrect priority date to the reserved water right for certain reacquired lands.

These issues do not merit this Court's review upon certiorari. The decision of the Wyoming Supreme Court on the questions presented by the cross-petition is not in conflict, indeed it is consistent, with the decisions of this and other appropriate courts. In addition, the questions presented were not properly raised or decided below and involve factual issues relating solely to the Wind River Reservation. The cross-respondent State of Wyoming has filed a thorough and carefully documented brief in opposition to the Tribes' Cross-Petition. The undersigned parties adopt the positions and the arguments of the State of Wyoming and, for the reasons stated in its brief and in this memorandum, respectfully request that this Court deny the Cross-Petition for Writ of Certiorari filed by the Tribes herein.

Respectfully submitted this 21st day of November, 1988.

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Nos. 88-309, 88-492 and 88-553

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, CROSS-PETITIONERS

v.

STATE OF WYOMING, ET AL.

CITY OF RIVERTON, WYOMING, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether the "water proviso" of the Act of March 3, 1905 (33 Stat. 1020)—which provides that the remaining balance of an $85,000 sum to be obtained from the sale of certain lands of the Wind River Indian Reservation shall, following a per capita distribution of $50 per Indian, "become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, * * * "—demonstrates that no federal reserved water rights were created when that Reservation was set aside in 1868 by the Second Treaty of Fort Bridger, or, alternatively, whether that water proviso terminated all reserved water rights created by the 1868 Treaty.

2. Whether the Act of March 3, 1905, which provided for the sale of certain reservation lands of the Wind River Indian Reservation and further provided that the Indians were to be compensated out of the sales proceeds as the lands were sold, terminated the federal reserved water rights attaching to lands that were never sold.

3. Whether this Court should reconsider its holding in *Arizona* v. *California,* 373 U.S. 546 (1963), that the amount of water reserved for agricultural purposes when an Indian reservation is established is that quantity of water that is required to irrigate the practicably irrigable acreage within the reservation.

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[1] This summation of the questions presented encompasses only those questions raised in the petition filed by the State of Wyoming in No. 88-309 and the cross-petition filed by the City of Riverton, Wyoming, et al., in No. 88-553. As discussed in the text below, the United States suggests that the Court grant review of the additional questions presented in the conditional cross-petition filed by the Shoshone and Northern Arapaho Tribes in No. 88-492, in the event that the Court grants the State's petition.

4. Whether the Wyoming Supreme Court erred by failing to use the discount rate formula established pursuant to Section 80(a) of the Water Resources Development Act of 1974, 88 Stat. 34, 42 U.S.C. 1962d-17(a), to determine whether certain reservation lands that have never been irrigated are practicably irrigable.

5. Whether the Wyoming Supreme Court correctly resolved issues concerning the status of water rights for lands that had at some previous time been conveyed to non-Indians.

6. Whether the United States may be estopped in this case from asserting reserved water rights on behalf of the Indian Tribes pursuant to a federal treaty.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Antoine v. *Washington*, 420 U.S. 194 (1975) 16
Arizona v. *California*, 373 U.S. 546 (1963) 11, 17, 18, 21
Arizona v. *California*, 460 U.S. 605 (1983) 19, 21
Arizona v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983) 28
Ash Sheep Co. v. *United States*, 252 U.S. 159 (1920) 16
California Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935) 27-28
Cappaert v. *United States*, 426 U.S. 128 (1976) 12, 20
Colville Confederated Tribes v. *Walton*, 647 F.2d 42 (9th Cir.), cert. denied, 454 U.S. 1092 (1981) 24, 25, 26
Heckler v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984) 27
Johnston v. *Davis*, 698 F.2d 1088 (10th Cir. 1983) 23
Menominee Tribe v. *United States*, 391 U.S. 404 (1968) .. 15
Northwestern Band of Shoshone Indians v. *United States*, 324 U.S. 335 (1945) 4
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) .. 13
Rosebud Sioux Tribe v. *Kneip*, 430 U.S. 584 (1977) 17
Russello v. *United States*, 464 U.S. 16 (1983) 12
Solem v. *Bartlett*, 465 U.S. 463 (1984) 14, 16
United States v. *Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984) 21
United States v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957) 21
United States v. *Anderson*, 736 F.2d 1358 (9th Cir. 1984) 24, 25, 26
United States v. *Brindle*, 110 U.S. 688 (1884) 16

Cases—Continued: Page

United States v. *Dion*, 476 U.S. 734 (1986) 14
United States v. *New Mexico*, 438 U.S. 696 (1978) 11, 12, 18, 19, 20, 25
United States v. *Price*, 361 U.S. 304 (1960) 12
United States v. *Shoshone Tribe*, 304 U.S. 111 (1938) 4
United States v. *Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939) 21
Ute Indian Tribe v. *State of Utah*, 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986) 16
Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) 18, 19
Winters v. *United States*, 207 U.S. 564 (1908) 6, 10, 11, 13, 25

Treaties and statutes:

First Treaty of Fort Bridger, July 2, 1863, 18 Stat. 685 ... 4
Art. IV, 18 Stat. 686 4
Second Treaty of Fort Bridger, July 3, 1868, 15 Stat. 673 ..... *passim*
Art. II, 15 Stat. 674 ..... 4, 18
Art. IV, 15 Stat. 674-675 4
Art. VI, 15 Stat. 675 4
Art. VIII, 15 Stat. 675-676 ..... 3, 4
Act of Dec. 15, 1874, ch. 2, 18 Stat. 291 5
Act of June 7, 1897, ch. 3, § 12, 30 Stat. 93 5
Act of Mar. 3, 1905, ch. 1452, 33 Stat. 1016 .....4, 5, 11, 12, 13, 14, 15, 17, 26
Art. I, 33 Stat. 1016 ..... 5, 15
Art. II, 33 Stat. 1016-1017 .....5, 16, 18
Art. III, 33 Stat. 1017 ..... 5, 13
Art. IX, 33 Stat. 1018 .....5, 14, 16
Art. X, 33 Stat. 1018 14
Indian Reorganization Act, ch. 576, 48 Stat. 984 6
McCarran Amendment, 43 U.S.C. 666 3
National Environment Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 23
Water Resources Development Act of 1974, § 80(a), 42 U.S.C. 1962d-17(a) 22, 23
Wyo. Stat. § 1-37-106 (1977) 2

Statutes – Continued: Page

25 U.S.C. 463(a) 6

Miscellaneous:

H.R. Rep. 3700, 58th Cong., 3d Sess. (1905) 13

S. Rep. 4263, 58th Cong., 3d Sess. (1905) 13

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-309

STATE OF WYOMING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 88-492

SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, CROSS-PETITIONERS

v.

STATE OF WYOMING, ET AL.

No. 88-553

CITY OF RIVERTON, WYOMING, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Wyoming Supreme Court (Pet. App. 1a-119a) is reported at 753 P.2d 76. The district court's amended judgment and decree (Pet. App. 168a-184a), order ruling on motions to alter or amend the decision

(Pet. App. 185a-210a), and decision (Pet. App. 202a-279a) are not yet reported. The report and decree of the special master (Pet. App. 367a-708a) are also unreported.

JURISDICTION

The decision of the Wyoming Supreme Court (Pet. App. 1a) was entered on February 24, 1988. Timely petitions for rehearing were denied on April 22, 1988 (Pet. App. 120a). On July 7, 1988, Justice White extended the time for filing a petition for a writ of certiorari to August 20, 1988. The petition for a writ of certiorari was filed on August 18, 1988. The cross-petitions in Nos. 88-492 and 88-553 were filed on September 21, 1988, and are timely under Rule 19.5 of the rules of this Court. The jurisdiction of this Court over the petition and cross-petitions is invoked under 28 U.S.C. 1257(3).

STATEMENT

The State of Wyoming petitions for a writ of certiorari to review the Wyoming Supreme Court's decision, in the first phase of a general stream adjudication, recognizing the reserved water rights of the Shoshone and Northern Arapaho Indian Tribes. The Indian Tribes and certain non-Indian respondents have filed cross-petitions for a writ of certiorari.

1. In 1977, Wyoming enacted legislation authorizing its Attorney General to "institute an action to have determined in a general adjudication the nature, extent, and relative priority of the water rights of all persons in any river system and all other sources * * * " (Wyo. Stat. § 1-37-106 (1977) (Pet. App. 726a-728a)). The State then promptly commenced this action in the Wyoming District Court for the Fifth Judicial District. The complaint sought a general adjudication of the rights to use water in Water

Division No. 3, which consists primarily of that portion of the Big Horn River drainage system located within Wyoming, including the Wind River Indian Reservation.[2] The complaint requested, in essence, a determination of all water rights within Water Division No. 3. The United States was joined under the McCarran Amendment, 43 U.S.C. 666.

The state district court, after granting intervention for the Shoshone Tribe and the Northern Arapaho Tribe of the Wind River Reservation, referred the case to a special master.[3] The special master divided the case into three phases. Phase I—the phase at issue here—encompasses water rights reserved by federal law and held by the Shoshone and Northern Arapaho Tribes or by the United States on their behalf, and Indian reserved rights claimed by non-Indian successors to Indian allottees.[4]

a. The Wind River Indian Reservation was established on July 3, 1868, by the Second Treaty of Fort Bridger, 15 Stat. 673 (Pet. App. 793a-803a), which was entered into by the United States and the Shoshone and Bannock Tribes.[5]

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[2] Water Division No. 3 also included the Clark's Fork of the Yellowstone River (Pet. App. 9a).

[3] The United States had initially removed the action to the United States District Court for the District of Wyoming, but that court remanded the suit back to state court (Pet. App. 718a-724a).

[4] Phase II covers all non-Indian reserved water rights claimed by the United States in Water Division No. 3, while Phase III involves all water rights in that division not covered by Phases I and II. Phase III includes rights evidenced by state permits or certificates held by the United States, its agencies, and the Shoshone and Arapaho Tribes. Phase II was resolved by a stipulation and judgment, while Phase III is still pending (Pet. App. 13a-15a).

[5] The Bannock Tribe, as provided in Article II of the 1868 Treaty (15 Stat. 674), subsequently chose for itself the Fort Hall Reservation in what is now the State of Idaho. There is also a band of Shoshone Indians on the Fort Hall Reservation.

Under the 1868 Treaty, the Shoshone Tribe relinquished to the United States all claims to more than 44 million acres in what are now the States of Colorado, Utah, Idaho, and Wyoming.[6] In return, the Shoshone Tribe accepted the Wind River Reservation in what is now Wyoming. The Reservation consisted of approximately 3 million acres "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians * * * and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them" (art. II, 15 Stat. 674). The Indians agreed to make the Reservation their permanent home (art. IV, 15 Stat. 674-675). The Treaty provided for the allotment of reservation lands to individual Indians who "shall desire to commence farming" (art. VI, 15 Stat. 675) and further provided for seeds, implements, and agricultural instruction for Indians who commenced cultivation (art. VIII, 15 Stat. 675-676). In 1878, the Northern Arapaho Tribe was settled on the Wind River Reservation without the consent of the Shoshone Tribe. See *United States* v. *Shoshone Tribe,* 304 U.S. 111, 114 (1938).

By an agreement signed in 1904 and approved with modification by the Act of March 3, 1905, ch. 1452, 33 Stat. 1016 (Pet. App. 769a-781a), the Shoshone and Northern Arapaho Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest * * * " in the portion of the Reservation located north of the Wind River, as well as the portion located east of the

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[6] The boundaries of the "Shoshone country" were described in Article IV of the First Treaty of Fort Bridger, concluded on July 2, 1863, 18 Stat. 685, 686. The First Treaty of Fort Bridger was one of several treaties concluded in 1863 between the United States and the various bands of Shoshone Indians. See *Northwestern Band of Shoshone Indians* v. *United States,* 324 U.S. 335 (1945).

Popo Agie River (art. I, 33 Stat. 1016).[7] The ceded lands, which amounted to approximately 1,480,000 acres (Pet. App. 10a), were to be disposed of "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash," and the United States agreed to pay to the Indians the proceeds derived from the sales of the lands (art. II, 33 Stat. 1016-1017). The United States, however, did not guarantee to find purchasers for the lands but, rather, agreed to "act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided" (art. IX, 33 Stat. 1018).

Article III of the 1904 Agreement provided that $85,000 of the sum derived from the sale of the subject lands would be devoted to making a per capita cash payment of $50 dollars to each Indian (33 Stat. 1017). Following this per capita payment, the remaining balance of the $85,000 sum "shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve" (33 Stat. 1017).

By 1914, approximately 129,000 acres of the 1,480,000 acres covered by the 1904 Agreement (and 1905 Act) had been sold. See Pet. App. 412a. In 1915, however, the Sec-

[7] The Indians had made two earlier cessions of lands included within the Wind River Indian Reservation as established by the 1868 Treaty. These were the "Lander Purchase" or "Brunot Agreement" executed on September 26, 1872, and ratified on December 15, 1874, 18 Stat. 291 (Pet. App. 409a), and the "Thermopolis Purchase" or "First McLaughlin Agreement" executed on April 21, 1896, and ratified on June 7, 1897 (30 Stat. 93 (Pet. App. 410a)).

retary of the Interior temporarily postponed further sale of the ceded lands, and from 1915 through 1934 only a few acres were sold. See *id.* at 412a-413a. In 1934, Congress enacted the Indian Reorganization Act, ch. 576, 48 Stat. 984, which, among other things, authorized the Secretary of the Interior to restore fully to permanent tribal ownership the remaining surplus lands of any Indian reservation previously opened to sale or other forms of disposal. See 25 U.S.C. 463(a). Later that same year, the Secretary temporarily withdrew from further disposition the remaining land ceded under the 1904 Agreement (Pet. App. 413a). Subsequently, under a series of restoration orders approved by Congress (*id.* at 731a-752a), all of the remaining undisposed lands ceded by the 1904 Agreement were fully restored to permanent tribal ownership. See *id.* at 413a. In addition, numerous parcels of land on the Reservation that had once passed into non-Indian ownership, either by sale under the 1905 Act or by purchase from Indian allottees, have been reacquired on behalf of the Tribes. See *id.* at 11a.

b. The special master issued his report and recommended final decree on December 15, 1982 (Pet. App. 367a-708a).[8] The special master found that the purpose of the 1868 Treaty was to establish a permanent homeland for the Indians and that this purpose included, but was not limited to, agricultural development of the reservation lands suitable for that purpose (Pet. App. 442a-443a, 643a). Applying the doctrine announced by this Court in *Winters* v. *United States,* 207 U.S. 564 (1908), the special

[8] We describe here only those rulings of the special master, the district court, and the state supreme court that are the most pertinent to the issues raised in the petition. The special master and state courts also entered various other rulings that are discussed in the cross-petition filed by the Tribes.

master found that "Congress, by ratification of the Treaty of 1868, impliedly created a reserved right for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty" (Pet. App. 641a). The special master then determined that the reserved water rights created by the 1868 Treaty had not been terminated by the 1904 Agreement and that the Tribes continue to hold reserved water rights with an 1868 priority date for lands that were never sold pursuant to the 1904 Agreement (*id.* at 411a-420a, 638a-639a). He further ruled that the United States was not estopped from asserting federal reserved water rights on behalf of the Indians (*id.* at 623a-627a, 687a-688a).

The special master recommended the award of an 1868 priority date with regard to all tribal, allotted, or Indian fee land within the reservation that has never left Indian ownership or that had left Indian ownership but had been reacquired by the Tribes prior to the date of his report, provided that the lands were shown to be practicably irrigable (Pet. App. 424a-425a, 639a, 641a-642a). The special master also ruled that non-Indians who purchased land from Indian allottees did not acquire a share of the Indians' reserved water rights (*id.* at 425a-431a, 640a).

Turning to the task of quantifying the agricultural reserved water right, the special master ruled that the amount of water reserved for such purposes was that quantity required to irrigate those lands shown to be "practicably irrigable acres" (Pet. App. 534a). He defined "practicably irrigable acres" (in accordance with the use "agreed upon [in this case] by counsel for the State, the United States and the Tribes") as defined to mean "those acres susceptible to sustained irrigation at reasonable costs" (*ibid.*). Applying this standard, the special master first addressed and resolved issues regarding the Reservation's "historic acres"—lands that are now irrigated or that have been irrigated in the past (*id.* at 463a-531a, 643a-

672a). He then addressed and resolved matters concerning the Reservation's "future lands"—lands that have not been irrigated to date but that are claimed to be practicably irrigable (*id.* at 532a-591a, 672a-682a). In resolving the future lands issue, the special master accepted the testimony of the United States' witnesses that a "real" discount rate of four percent—which excludes the effects of present or expected inflation—should be used in determining whether the future lands can be feasibly irrigated (*id.* at 574a-580a, 680a). The special master ultimately recommended an award of 477,300 acre-feet per year for irrigation purposes.[9] The special master also recommended an award of additional reserved waters based on non-agricultural purposes (*id.* at 696a-702a).[10]

c. The district court accepted most of the recommendations of the special master (Pet. App. 121a-131a, 168a-279a). The district court concluded, however, that the primary purpose of the 1868 Treaty was to create an agricultural reservation, and it therefore rejected the special master's recommendations to confirm reserved

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[9] This figure was based on a recommended award of 288,355 acre-feet needed to irrigate 54,389 acres of Indian lands, including Indian-owned fee lands, that have historically been irrigated, plus an additional 188,937 acre-feet needed to irrigate 48,520 acres in "future projects" (Pet. App. 695a). The special master also recommended that the decree limit construction of any irrigation projects for the future lands to no more than ten percent of total awarded acreage for future projects in any given decade following 1982, unless sufficient replacement waters are made available through upstream storage facilities so as to allow non-Indian water users to continue to use the same amounts as they are presently using (*id.* at 580a-584a).

[10] The special master subsequently issued a Supplemental and Final Report (Pet. App. 280a-366a) addressing primarily the claims of non-Indians holding former allotted lands. The special master ruled that "non-Indians who purchase from Indians do not receive superior rights stemming from the treaty" (*id.* at 286a).

water rights for non-agricultural purposes (*id.* at 182a, 216a-222a, 262a-263a). The district court also rejected the special master's recommendation of an 1868 priority date for lands that had passed into non-Indian ownership and had since been reacquired. The court ruled that the priority date for such lands was to be the earliest of: 1) the date upon which the land left Indian ownership and was purchased by a non-Indian; 2) the date of the applicable state water permit; or 3) the date of first application of water to beneficial use (*id.* at 173a). The district court awarded a reserved right of 394,631 acre-feet annually with an 1868 priority date (*id.* at 169a-172a) and a reserved right totalling 84,800 acre-feet with varying priority dates (*id.* at 172a-182a). In addition, the district court initially adopted that part of the special master's recommendation that would condition the use of the portion of the 1868 reserved water right awarded with respect to the future lands upon the provision of storage facilities sufficient to provide replacement water to junior non-Indian water users (*id.* at 234a-237a, 267a). Upon reconsideration, however, the court held that the water right could be exercised in the absence of any storage facilities to provide replacement water (*id.* at 194a-198a, 200a-201a).

2. The Wyoming Supreme Court affirmed most of the rulings of the district court (Pet. App. 1a-119a). It found, however, that the district court had erred in adopting the special master's recommendation of a ten percent reduction in the Indians' "future projects" land base to provide a margin of error (*id.* at 56a-58a). The court also ruled that the non-Indian appellants who acquired lands from Indian allottees must be awarded a reserved water right having an 1868 priority date for any of those lands that they can show are practically irrigable and either were irrigated by their Indian predecessors or were put under irrigation within a reasonable time after the date upon which they passed from Indian ownership (*id.* at 75a). Finally, the

court agreed with the special master's finding of an 1868 priority date for the reserved water rights claimed for allotted lands that had passed into non-Indian ownership and that had subsequently been reacquired by the Tribes. Accordingly, the Wyoming Supreme Court reversed the district court's holding of a later priority date for such lands (*ibid.*).

ARGUMENT

The State of Wyoming initiated this action to obtain a quantification of the Indian Tribes' water rights in the Big Horn Basin. Now, after a decade of litigation, including review by that State's highest Court, Wyoming has obtained what it sought—a definitive resolution of the Tribes' entitlement. Here, as is usually the case in complex general stream adjudications, none of the parties has obtained everything that it sought. But the Wyoming Supreme Court's decision is fundamentally fair, and the particular portions of the opinion below that petitioner and the non-Indian cross-petitioners now challenge are correct and do not conflict with any decision of this Court. To the contrary, they are consistent with this Court's decisions concerning water rights claimed on behalf of Indian reservations. Nor has the Wyoming Supreme Court articulated legal principles in this case that conflict with those followed by other appellate courts in similar cases. Accordingly, the petition for a writ of certiorari—and a fortiori the Indian and non-Indian cross-petitions—should be denied.

1. This Court held in *Winters* v. *United States*, 207 U.S. 564 (1908), that when the United States reserves lands on behalf of an Indian tribe, the United States at the same time also impliedly reserves for the use of the Indians such previously unappropriated waters as are needed to fulfill the purposes of the reservation. As the Court has since explained: "*Winters* concluded that the Government, when it

created [the] Indian reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." *Arizona* v. *California,* 373 U.S. 546, 600 (1963) (*Arizona I*). These *Winters* reserved water rights vested "as of the time the Indian Reservations were created." *Arizona I,* 373 U.S. at 600.

The language of the 1868 Treaty unambiguously indicates that one of the purposes of that treaty was to promote the establishment of agriculture on the Wind River Reservation. Furthermore, it is undisputed that the reserved lands require irrigation in order to produce crops (Pet. App. 26a). Thus, the special master, the district court, and the Wyoming Supreme Court all found, in accordance with the *Winters* doctrine, that the 1868 Treaty was intended to reserve water to carry out the agricultural purposes of the Reservation (*id.* at 26a-31a, 210a-222a, 431a-446a). Petitioner does not contend that the language of the Treaty itself or any documents or circumstances contemporaneous with its execution and ratification suggest a contrary result.[11] Rather, petitioner asserts (Pet. 12-18) that the "water proviso" to the 1905 Act somehow precludes the "judicial creation" of an implied reserved water right for the Reservation (Pet. 12), or, alternatively, that any reserved water rights created by the 1868 Treaty were subsequently extinguished by the water proviso to the 1905 Act.

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[11] Petitioner does suggest that the *Winters* doctrine has been undermined by *United States* v. *New Mexico,* 438 U.S. 696 (1978). Petitioner relies on a passage from that opinion that states (*id.* at 700):

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.

Petitioner, taking the words "entirely defeated" out of their context, maintains (Pet. 15-16) that the agricultural purposes of the Wind

The Wyoming Supreme Court properly rejected these contentions (Pet. App. 28a-32a). The 1905 Act does not, of course, shed any direct light on the intent of the parties to the 1868 Treaty. And even if that legislation provided a basis for inferring the 1905 Congress's view of the 1868 Treaty, such inferences would carry limited weight. It is "well settled" that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Russello* v. *United States,* 464 U.S. 16, 26 (1983) (quoting *United States* v. *Price,* 361 U.S. 304, 313 (1960)).

The 1905 Act, in any event, provides no reasonable basis for inferring the 1905 Congress's views on whether the 1868 Treaty created a reserved water right. The water proviso, which appears in Article III of the 1905 Act (Pet. App. 778a-779a), merely states that the remaining balance of an $85,000 sum to be obtained from the sale of certain Indian lands shall, following a per capita distribution of $50 per Indian, "become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights

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River Indian Reservation would not have been "entirely defeated" without a federal reserved water right because the Indians could have obtained water rights to a portion of their lands by securing the rights under state law. The possible availability of a state-law water right for some lands, however, is not an appropriate basis for rejecting a federal reserved right. Rather, as the extract from *New Mexico* quoted above clearly indicates, the appropriate test focuses upon whether water is needed in the physical sense to attain the purposes of the reservation. If so, then the courts will find an implied federal reserved water right effective as of the date the reservation was established. *Cappaert* v. *United States,* 426 U.S. 128, 138-139, 145 (1976). In this case, that date is 1868, long before Wyoming was admitted to the Union and therefore long before water rights could have been acquired pursuant to state law.

from said State for the irrigation of such lands as shall remain the property of said Indians * * * " (33 Stat. 1017). This proviso provides no concrete basis for inferring a congressional understanding that the 1868 Treaty—despite its explicit contemplation of agricultural development—failed to reserve the water necessary for that development. The proviso indicates, *at most,* some doubt whether—or to what extent—such reserved water rights existed. The 1905 Act, of course, predated this Court's 1908 *Winters* decision. Thus, the contours of the federal reserved rights doctrine, and the quantities of water that might be claimed under that doctrine, were then unresolved. Congress, responding to this uncertain state of the law, presumably elected to assist the Tribes in securing water rights in order to ensure that the Tribes would receive sufficient water for their land even if federal law did not already secure the necessary water rights. Petitioner's further inference that Congress's actions should be taken as an affirmative denial by Congress of the existence of a reserved water right is unwarranted.[12]

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[12] Petitioner is mistaken in suggesting (Pet. 12-13, 17) that Congress's rejection of proposals that would have expressly created a reserved right for the Wind River Reservation demonstrate that Congress wished to deny the Tribes such rights. The proposal to amend the 1905 Act to give the Indians a grace period in which to secure their own permits for allotments on the ceded portion of the Reservation (see H.R. Rep. 3700, 58th Cong., 3d Sess. 7-9 (1905)) does not indicate a congressional belief that there never was any prior intent to reserve water for the Indians. This proposal was rejected because it was feared that the statutory grace period would delay settlement of the opened area. See S. Rep. 4263, 58th Cong., 3d Sess. 2 (1905). As for the 1914 proposal, it was not enacted because it was introduced as an amendment to an appropriations bill and was ruled out of order. See Pet. App. 31a. In either instance, Congress's inaction is entitled to little weight in interpreting the 1868 Treaty. See, *e.g., Red Line Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 n.11 (1969).

A fortiori, the water proviso of the 1905 Act cannot reasonably be read as impliedly terminating the reserved water rights conferred by the 1868 Treaty.[13] This Court has required that "Congress's intention to abrogate Indian treaty rights be clear and plain." *United States* v. *Dion,* 476 U.S. 734, 738 (1986). See also, *e.g., Solem* v. *Bartlett,* 465 U.S. 463, 472 (1984). Petitioner falls far short of meeting that standard. The water proviso of the 1905 Act, which was essentially an appropriations measure concerning the disposition of a part of the funds to be generated by the land sales contemplated in the 1904 Agreement, does not expressly or impliedly surrender any water rights for the unsold lands that the Tribes held prior to the enactment of that statute. Nor has petitioner advanced any legislative history or surrounding circumstances showing a clear congressional intent to diminish existing treaty water rights for lands remaining in Indian ownership.[14] Indeed, Article X of the 1904 Agreement stated that nothing in that Agreement would deprive the Indians "of any benefits to which they are entitled under existing treaties or agree-

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[13] We address here petitioner's argument (Pet. 15-18) that the water proviso terminated all of the 1868 Treaty reserved water rights, without distinction as to the lands made subject to disposition under that Act and the lands of the "diminished" Reservation. We deal below with petitioner's separate argument (Pet. 26-28) concerning the lands that were made subject to sale under the 1905 Act but that never passed into non-Indian ownership and were later restored to the Indians.

[14] Petitioner incorrectly asserts (Pet. 17) that "the Wyoming Supreme Court failed even to address the fact that Congress carefully considered and refused to enact a limited reserved water right for the Wind River Indian Reservation * * *." The Wyoming Supreme Court considered (Pet. App. 29a-31a) these congressional inactions (see n.12, *supra*) and determined that they do not reflect any intent concerning any water rights that were created by the 1868 Treaty. Consequently, the court concluded, those inactions failed to demonstrate that the 1905 Act terminated the Tribes' treaty water rights (Pet. App. 31a).

ments, not inconsistent with the provisions of this agreement" (Pet. App. 774a). Petitioner would read the 1904 Agreement as effecting a termination of all of the Tribes' treaty water rights, including those for lands that were not subject to disposition under the Agreement and for which no compensation whatsoever was to be provided. This Court should decline petitioner's invitation to construe the water proviso as a "backhanded way of abrogating the [treaty] rights of these Indians." *Menominee Tribe* v. *United States*, 391 U.S. 404, 412 (1968).[15]

2. Petitioner alternatively maintains (Pet. 26-28) that the Wyoming Supreme Court erred by confirming an 1868 priority date for the reserved water rights respecting lands that, although made subject to disposition under the 1905 Act, were never sold and were later restored to the Indians. Petitioner asserts that the 1904 Agreement effected an immediate relinquishment of the Indians' reserved water rights for all of those lands. The Wyoming Supreme Court correctly rejected that contention.

Article I of the 1904 Agreement provided that the Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest" in the subject lands (33 Stat. 1016). The ceded lands were to be disposed of "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash," and the United States

[15] If the parties to the 1904 Agreement had intended to effect a termination of the Indians' water rights, they were well aware of how to draft a provision reflecting such intent. The negotiator on behalf of the United States was the same Agent James McLaughlin who had negotiated the earlier "Thermopolis Purchase," concluded in 1897, by which the Indians had ceded approximately 55,000 acres of the Wind River Reservation to the United States. Unlike the 1904 Agreement, however, the Thermopolis Purchase Agreement provided not only for a cession of the subject lands, but also for cession of "the water rights appertaining thereunto * * * " (Pet. App. 410a). Those water rights, of course, could only have been federal reserved water rights.

agreed to pay to the Indians the proceeds derived from the sales of the lands (art. II, 33 Stat. 1016-1017). Article IX provided, however, that the United States did not guarantee to find purchasers for the lands but, rather, agreed to "act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided" (33 Stat. 1018).

Statutes ratifying agreements with Indians are to be construed in favor of the Indians. *Antoine* v. *Washington,* 420 U.S. 194, 199 (1975). Notably, the 1904 Agreement did not state, as did various other turn-of-the-century surplus lands acts, that the subject lands were being "conveyed" to the United States. See *Solem* v. *Bartlett,* 465 U.S. at 469 n.10. Rather, the United States was to hold the lands in trust for the Indians for the purpose of future sale. The Indians were not to receive a fixed amount in return for the lands; instead, they were to be compensated as the lands were sold. Indeed, the 1904 Agreement expressly declined to guarantee that purchasers for all of the lands would ever be found. Under these circumstances, the unsold lands were not restored to the public domain but, instead, always retained their status as Indian lands. See *Ash Sheep Co.* v. *United States,* 252 U.S. 159, 164-166 (1920); *United States* v. *Brindle,* 110 U.S. 688, 693 (1884). See also *Solem* v. *Bartlett,* 465 U.S. at 473; *Ute Indian Tribe* v. *State of Utah,* 773 F.2d 1087, 1090 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). Because the Indians would receive no compensation for any given parcel as long as that tract remained unsold, and because there was no assurance that the subject lands would ever be sold, the 1905 Act can be read in the manner petitioner suggests only by assuming an implied intent to effect an immediate, uncompensated termination of treaty water rights for lands that still retained their Indian status and

that might retain that status indefinitely. Such an assumption would be contrary to the rule disfavoring the construction of statutes ratifying agreements with the Indians to their prejudice. It would be illogical as well. The unsold lands themselves never lost their status as lands reserved for the benefit of the Indians, and, accordingly, they continued to have a federal reserved water right as an inherent attribute of that status.[16]

3. This Court held in *Arizona I* that when Congress establishes an Indian reservation, the measure of water reserved for agricultural purposes is the amount sufficient "to irrigate all the practicably irrigable acreage on the reservation[ ]" (373 U.S. at 600-601). The Wyoming Supreme Court expressly applied that standard to quantify the amount of water reserved for the Wind River Indian Reservation (Pet. App. 47a). Petitioner now requests (Pet. 18-26) this Court to reconsider the practicably irrigable acreage (PIA) standard. That request should be denied.

Petitioner, after a decade of litigation, asserts that the PIA standard should be abandoned and the quantification process should begin anew using some other standard that would be determined by reference to the Indians' reasonable needs. This Court, however, expressly rejected peti-

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[16] Petitioner relies (Pet. 28) on *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), which concerned the question whether a reservation had been disestablished for purposes of determining governmental jurisdiction over lands within the area in question. By contrast, the issue presented here is not whether the 1905 Act diminished the exterior boundaries of the Wind River Reservation for jurisdictional purposes, but rather a distinct question of property rights: whether that statute effected an immediate, implied termination of the Indians' reserved water rights for such lands. As the Indians' beneficial ownership of those lands continued up to the time of their sale, the Tribes' reserved water rights – which were one of the incidents of their beneficial ownership – likewise remained in effect pending disposition and continued uninterrupted for those lands that were never sold.

tioner's substitute methodology in *Arizona I*, stating (373 U.S. at 601):

> How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

That reasoning is equally compelling here.[17]

Petitioner asserts that the continuing validity of the PIA standard has been called into question by this Court's subsequent opinions in such cases as *United States* v. *New Mexico*, 438 U.S. 696 (1978), and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*Fishing Vessel*). Similarly, the non-Indian cross-petitioners contend (88-553 Cross-Pet. 10-18) that the *New Mexico* decision created an "equitable device" (*id.* at 17), whereby a court must consider junior

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[17] Petitioner attempts to distinguish *Arizona I* on the ground (Pet. 19, 20, 23, n.25) that the reservations in question there had not been established for the use of any particular tribes specifically identified when those reservations were created. Nothing in this Court's *Arizona I* opinion, however, attributes any significance to that circumstance. The Court rejected a "future needs" standard in favor of the PIA standard because "[h]ow many Indians there will be and what their future needs will be can only be guessed" (373 U.S. at 601). The statement remains accurate even when only one Indian tribe is being considered. But even if petitioner's suggestion were meritorious as a matter of law, it would be unavailing here. Article II of the 1868 Treaty stated that the Wind River Indian Reservation was set aside for the use of the Shoshone and Bannock Tribes "and for such other friendly tribes or individual Indians as from to time they may be willing, with the consent of the United States, to admit amongst them." 15 Stat. 674. Hence, the 1868 Treaty contemplated the possible settlement of additional, unspecified tribes on the Reservation. Subsequently, the Arapaho Tribe was settled upon the Wind River Indian Reservation without the consent of the Shoshone Tribe. See page 4, *supra*.

non-Indian uses of the common water supply and, depending upon the particular facts, limit the exercise of the Indians' senior water rights in order "to protect [junior] state water users *after* the facts and law have been correctly applied" (Pet. App. 17a (emphasis in original)).

This Court has previously declined to reconsider the PIA standard in light of *New Mexico* and *Fishing Vessel*. *Arizona* v. *California*, 460 U.S. 605, 625-626 (1983) (*Arizona II*). In any event, petitioner's and cross-petitioners' reliance upon *New Mexico* and *Fishing Vessel* is misplaced. The question considered by this Court in *New Mexico* concerned the purposes for which water is reserved when lands are set aside for a national forest, and *Fishing Vessel* involved the allocation of fisheries where the Indians hold a treaty right to fish "in common with all citizens of the Territory." 443 U.S. at 659. Neither case concerned Indian water rights or addressed the PIA standard.

Furthermore, *New Mexico* does not, as the non-Indian cross-petitioners contend, furnish an "equitable device" for limiting the exercise of a federal reserved right once it has been determined such a right exists. Rather, *New Mexico* concerned only the issue of what circumstances are sufficient to give rise to a federal reserved water right in the first place. This Court stated (438 U.S. at 702):

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would ac-

quire water in the same manner as any other public or private appropriator.

The *New Mexico* decision does not announce any equitable limitations on the recognition of a federal reserved water right. The decision simply holds that *implication* of a federally reserved water right to fulfill a reservation's secondary purposes would be inconsistent with Congress's policy of deferring to state water law. Indeed, this Court has expressly declined to adopt an "equitable balancing" approach in cases involving federal reserved water rights. The State of Nevada contended in *Cappaert* v. *United States, supra,* that this Court's decisions involving federal reserved water rights established "an equitable doctrine calling for a balancing of competing interests" (426 U.S. at 138). This Court, however, rejected that contention, noting that "an examination of those cases shows they do not analyze the doctrine in terms of a balancing test" (*ibid.*).[18] Cross-petitioners' contention here that the exercise of a federal reserved water right must be limited so as "equitably" to accommodate the demands of competing junior water users is indistinguishable in principle from the equitable balancing argument that this Court rejected in *Cappaert.*[19]

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[18] This Court further stated (426 U.S. at 139 n.4):

> Nevada is asking, in effect, that the Court overrule *Arizona* v. *California,* 373 U.S. 546 (1963), and *United States* v. *District Court for Eagle County,* 401 U.S. 520 (1971), to the extent that they hold that the implied-reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the "competing equities." * * * However, since balancing the equities is not the test, those cases need not be disturbed.

[19] Moreover, the Wyoming Supreme Court demonstrated a "sensitivity" (88-553 Cross-Pet. 13) to the interests of other water users, stating (Pet. App. 72a):

> In the case at bar, the purpose of the reservation for which water is reserved is narrow—agricultural only. The right was

In sum, petitioner and the non-Indian cross-petitioners have shown no adequate reason for now reconsidering the PIA standard.[20] As this Court observed in *Arizona I,* the PIA standard is particularly well suited to quantification of the reserved water rights for the agricultural purposes of Indian reservations. It offers a comparatively objective means of quantifying such rights, whereas any standard based upon "foreseeable needs" would necessarily involve a high measure of subjective judgment. Here, as in *Arizona II,* reconsideration of the PIA standard would open a "Pandora's Box" (460 U.S. at 625) and inject grave uncertainty into Indian water rights litigation.[21]

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quantified based on PIA—the master and the [district] court rejecting some 50,000 acres originally claimed by the United States and the Tribes. The Indians' claim was further reduced by requiring an efficiency increase in historic lands. All of this evidences a sufficient sensitivity to the water needs of other water users.

[20] Petitioner maintains (Pet. 23-26) that the Wyoming Supreme Court's use of the PIA standard conflicts with the decisions in *United States* v. *Walker River Irr. Dist.,* 104 F.2d 334, 339-340 (9th Cir. 1939), in which the court applied a "needs" standard, and *United States* v. *Ahtanum Irrigation District,* 236 F.2d 321, 337 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), in which the court found an implied reservation of such waters as were "required to provide for the reasonable needs of the Indians * * *." Both of those Ninth Circuit decisions, however, preceded this Court's decision in *Arizona I.* Thus, to the extent that they deviate from the PIA standard, they have no continuing precedential value, and in fact the Ninth Circuit has applied the PIA standard since *Arizona I* was decided. See, *e.g., United States* v. *Adair,* 723 F.2d 1394, 1415-1416 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).

[21] Petitioner's contention (Pet. 23-26) that the application of the PIA standard in this case resulted in a grossly excessive award is meritless. The Tribes relinquished their claims to vast aboriginal lands in exchange for the Wind River Reservation. The 1868 Treaty that effected this exchange recognized that the Tribes faced substantial cultural obstacles in developing an agricultural economy and that the

4. The non-Indian cross-petitioners contend (88-553 Cross-Pet. 19-22) that the Wyoming courts were obligated to use the discount rate established by the Water Resources Council (WRC) pursuant to Section 80(a) of the Water Resources Development Act of 1974 (WRDA), 42 U.S.C. 1962d-17(a), in considering whether lands on the Reservation can be feasibly irrigated in the future.

The choice of an appropriate discount rate is one step in determining whether acreage is "susceptible to sustained irrigation at reasonable costs" (Pet. App. 47a). The Wyoming Supreme Court correctly held that the special master's choice of a 4% discount was consistent with the expert testimony on the subject (Pet. App. 53a-54a). It is clear from the WRDA's plain terms that the Wyoming courts were not required as a matter of law to disregard their own assessment of the evidence and instead to employ the WRC discount-rate formula in quantifying Indian water rights. Section 80(a) states that the interest-rate formula established pursuant to that provision is to be

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Tribes' conversion from a nomadic to an agrarian existence would take time. Petitioner's contention that the Tribes should now be restricted to their "historic" water usage – and prevented from realizing further development of their practicably irrigable lands – is neither consistent with the Treaty nor fair. Indeed, given the special master's finding that "[t]he history of the Reservation consistently shows a level of unemployment far in excess of the rest of Wyoming" (Pet. App. 569a), it would appear that the Tribes have a compelling need to develop the agricultural potential of the Reservation. Thus, even if petitioner were correct that a court should attempt to calculate a reserved water right on the basis of its assessment of the Indians' "needs" – unanchored in any determination of the amount of irrigable land that Congress set aside for their benefit – there is no reason to believe that the quantification of the reserved water right in this case would be different. This case accordingly would not present a suitable occasion to revisit the PIA issue even if the Court were otherwise disposed to do so.

used "in plan formulation for discounting future benefits and computing costs by Federal officers, employees, departments, agencies, and instrumentalities in the preparation of comprehensive regional or river basin plans and the formulation and evaluation of Federal water and related land resources projects" (42 U.S.C. 1962d-17(a)). The WRDA requires federal agencies to use the WRC discount rate when making their feasibility studies concerning federal water-related projects. Such federal feasibility studies are specialized undertakings that often include a wide variety of public costs and benefits, such as flood control, effects on navigation, fish and wildlife, indirect economic benefits, and the like. They therefore may differ widely from other types of feasibility determinations, such as the one conducted here concerning the Tribes' future lands. The WRC interest rate was adopted for federal water project cost-benefit analysis only and is not necessarily appropriate for other purposes.[22]

5. Petitioner and the non-Indian cross-petitioners also object (Pet. 28-29; 88-553 Cross-Pet. 22-24) to the Wyoming Supreme Court's resolution of issues concerning the recognition of water rights when Indian lands pass into non-Indian ownership, as well as the recognition of water rights for such lands when they are reacquired by the Tribes. The Wyoming Supreme Court discussed these issues in a relatively brief portion (Pet. App. 72a-75a) of

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[22] The non-Indian cross-petitioners are mistaken in urging (88-553 Cross-Pet. 22 n.27) that the Wyoming Supreme Court's decision conflicts with the Tenth Circuit's decision in *Johnston* v. *Davis*, 698 F.2d 1088 (1983). *Johnston* holds only that a federal agency may use the WRC discount rate when preparing an environmental impact statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* It yields no suggestion that a state court must use the WRC discount rate when quantifying an Indian tribe's reserved water rights.

its lengthy opinion, and, contrary to the contention of petitioner and the non-Indian cross-petitioners, it did not articulate any principles of law that conflict with those expressed by the Ninth Circuit in *Colville Confederated Tribes* v. *Walton,* 647 F.2d 42, cert. denied, 454 U.S. 1092 (1981), and *United States* v. *Anderson,* 736 F.2d 1358 (1984). These issues therefore do not warrant review.

In *Walton,* the Ninth Circuit held that the non-Indian successor to an allottee takes title to the allottee's proportionate share of the reserved right, provided that the allottee had put the water to use or that the non-Indian purchaser does so within a reasonable time (647 F.2d at 51). Any such water right, moreover, must be maintained by continued use and not lost by non-use (*ibid.*). The Wyoming Supreme Court discussed *Walton,* with approval, in that portion of its opinion dealing with the water rights of the individual non-Indian appellants who are successors to Indian allottees (Pet. App. 72a-75a), stating that "[o]n remand, appellants [non-Indian successors] must be awarded a reserved water right with an 1868 priority date for the PIA they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter" (Pet. App. 75a). The court, however, did not expressly state, as did the Ninth Circuit in *Walton,* that any such rights must be continually maintained in order to protect them from loss through non-use. Unlike the non-Indian cross-petitioners (88-553 Cross-Pet. 24), however, we do not read the Wyoming Supreme Court's failure expressly to spell out the consequences of non-use as creating a conflict with *Walton.* The Wyoming Supreme Court did not state that *Walton* rights held by non-Indians cannot be lost through non-use. Rather, the court simply failed to address that subject one way or the other, perhaps because further proceedings are contemplated on

the rights of non-Indians who claim *Walton* rights (Pet. App. 75a). Hence, the opinion of the Wyoming Supreme Court cannot reasonably be read as adopting the principle that *Walton* rights, once established, may not be lost through non-use.

In *Anderson,* the Ninth Circuit further held that if a tribe reacquires formerly allotted lands, the "*Winters* rights appurtenant to allotted lands conveyed to a non-Indian purchaser will pass with title upon reacquisition by the Tribe and will retain their original priority date" (736 F.2d at 1362). The Wyoming Supreme Court's opinion in this case contains nothing indicating that it disagreed with the Ninth Circuit's discussion in *Anderson* of the appropriate principles to be applied when an Indian tribe reacquires allotted lands. The Wyoming Supreme Court simply stated, after discussing the rights of the *non*-Indian purchasers of allotted lands (Pet. App. 72a-75a), that when such lands are reacquired by the Tribe, there "is no reason then to deny the same priority to an Indian or tribal purchaser" (Pet. App. 75a). Petitioner objects (Pet. 29) that the court did not expressly state that there must be a showing that the reserved right was not lost through non-use by the intervening non-Indian owner. However, the court made clear that the tribal purchaser succeeds to the "same priority" as a non-Indian purchaser, and it therefore presumably would agree with the position of *Anderson*—and of petitioner herein—that the Tribe does not obtain a reserved right to reacquired lands if the reserved right has already been lost by the intervening non-Indian owner. The court's failure to address this issue explicitly may be due to petitioner's failure to make a showing of such a loss by non-use with respect to particular parcels of reacquired allotted lands.

Finally, the Ninth Circuit held in *Anderson* that, as to former Indian lands that were disposed of to non-Indians under a surplus lands act (rather than by Indian allottees)

and were later reacquired on behalf of the Indians, the tribe obtains a water right with a priority date as of the time the non-Indian obtained a water right, if any (736 F.2d at 1363). If no such state-law water right existed upon the date of reacquisition, then the tribe obtains a reserved water right with a priority date as of the date of reacquisition (*ibid.*). In this case, the Wyoming Supreme Court did not separately address the existence of water rights for those reacquired lands that originally were disposed of to non-Indians under the 1905 Act, rather than by individual allottees. The court's silence may be attributable to the fact that petitioner itself failed to urge that those lands should be treated differently and to lay a proper foundation for such an argument in the course of this litigation. Indeed, although the United States brought this aspect of *Anderson* to the attention of the Wyoming Supreme Court, petitioner urged that Court to disregard *Anderson* and to deny a reserved water right to *all* reacquired lands, whether they were originally alienated by individual allottees or pursuant to the 1905 Act. See generally Brief of Appellee State of Wyoming in Response to the Appellant's Brief of the United States and Tribes (Type 1 Claims), at 151-185. Against this background, the Wyoming Supreme Court's failure to address the 1905-Act lands separately is understandable.[23] In any event, the Wyoming Supreme Court's *silence* with respect to lands disposed of under a surplus lands act does not create a conflict with the Ninth Circuit's discussion of that subject in *Anderson*.[24]

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[23] Petitioner did rely on this distinction in its brief in support of its petition for rehearing (at 46-50) in the Wyoming Supreme Court, but the court denied that petition without comment (Pet. App. 122a). The state court's failure to address that issue at petitioner's behest for the first time on rehearing does not raise an issue for this Court's consideration.

[24] The district court, which—contrary to the Ninth Circuit's holdings in *Walton* and *Anderson*—ruled (Pet. App. 224a-225a) that

6. The non-Indian cross-petitioners also assert (88-553 Cross-Pet. 24-30) that the United States should be equitably estopped from asserting reserved water rights on behalf of the Tribes because the United States induced non-Indians to settle in the area knowing that the land could be profitably farmed only by irrigation, which, in turn, necessitated secure water supplies. The Wyoming Supreme Court correctly rejected that argument (Pet. App. 22a-23a).

The United States would not be estopped here even under the rules generally applicable in cases involving wholly private parties. Equitable estoppel requires, as an indispensable element, a misrepresentation by the party against whom the estoppel is invoked. See *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). There is no showing here that the United States ever represented that there would be sufficient water to irrigate lands patented to non-Indian settlers under the general public land laws. It is well established that a federal patent does not carry with it any right to the use of water; rather, an entryman must look elsewhere to perfect a water right. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 158-164

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an Indian allottee's non-Indian successor could not acquire a share of the reserved water right, did identify parcels that had passed into non-Indian ownership and that were subsequently reacquired on behalf of the Tribes (Pet. App. 173a-182a). The district court, however, did not differentiate between former allotted lands and former surplus-land-act lands. Notably, however, even under the district court's holding, the great majority of the water rights associated with the reacquired lands would be awarded early priority dates, typically before 1920. Petitioner has not asserted that the difference between such priority dates, as awarded by the district court, and the 1868 priority date awarded by the Wyoming Supreme Court, will, as a practical matter, have significant adverse effects upon water rights claimed by other parties.

(1935). Hence, the United States does not, by making lands available under the public land laws, represent that sufficient water will be available to make the lands productive. Nor is there any showing here that the United States ever represented that it would not claim reserved water rights on behalf of the Tribes. In fact, the district court specifically held that there is "no evidence in the record to support a finding of affirmative misconduct by the Federal Government" (June 8, 1984, Order at 13). The lack of any misrepresentation concerning water rights is, alone, fatal to any equitable estoppel argument.

7. The Shoshone Tribe and the Northern Arapaho Tribe of the Wind River Indian Reservation have filed a conditional cross-petition requesting that, if the Court grants Wyoming's petition for a writ of certiorari, the Court also address six additional issues that the Wyoming Supreme Court decided against the Tribes. See 88-492 Cross-Pet. i-ii. In our view, this Court should not undertake review of Wyoming's claims of error in this complex water rights dispute without also considering those issues raised by the Tribes that are closely related. We therefore submit that if the Court grants Wyoming's petition, the Court should have before it the Tribes' issues as well. Cf. *Arizona* v. *San Carlos Apache Tribe,* 463 U.S. 545, 571 (1983).

CONCLUSION

The petition and cross-petitions for a writ of certiorari should be denied.

Respectfully submitted.

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